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THE
LAW OF INSURANCE,

AS APPLIED TO

FIRE, LIFE, ACCIDENT, GUARANTEE,

AND

OTHER NON-MARITIME RISKS.

BY

JOHN WILDER MAY.

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BOSTON:
LITTLE, BROWN, AND COMPANY.
1873.

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P R E F A C E.

AN effort has been made in the following pages to give, within the limits of an ordinary volume, such a statement of the law of Insurance as applicable to non-maritime subject-matters, as will meet the requirements of those engaged in the various branches of the business, the student, and the practising lawyer. To extract from the wealth of material furnished by the reports so much as seems to be essential to a correct understanding of the results arrived at; to set it out with the requisite fulness and precision; and to fuse the whole into a form having method, unity, and completeness, — has been found to be a work of much greater difficulty than was foreseen. Nevertheless, by a studied brevity in the statement of the earlier questions which may now be regarded as settled, room has been found to present, with considerable fulness, the discussions to be found in the reports upon many of the more recent questions which may be regarded as still undergoing the process of elaboration; such, for example, as the liability for loss by explosion, how far suicide is a defence, and the import of the phrase, “travelling by public conveyance.” Such a work, however, can never be truly

said to be finished. That it has been successfully begun, is more than the author will venture to affirm. Still, he believes that the profession will here find results which, however imperfect, they will welcome as a foretaste of something better, bearing, he trusts, such evidence of an earnest purpose to subserve their interests as they have a right to expect from

THE AUTHOR.

Boston, December, 1873.

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INSURANCE.

FIRE, LIFE, ACCIDENT, &c.

CHAPTER I.

OF THE NATURE OF THE CONTRACT.

§ 1. **Definition.**—Insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss. Such, in its most general terms, is the definition of the contract which is to constitute the subject of the following chapters. It is substantially the definition given long ago by Roccus, and is recommended alike by its brevity, its logic, and its comprehensiveness,—qualities upon which subsequent writers have scarcely been able to improve. “*Assecuratio*,” says that early writer, “*est contractus quo quis alienæ rei periculum in se suscepit, obligando se, sub certo pretio, ad eam compensandam, si illa perierit.*”¹ Neither the times and amounts of payments by the insured, nor the modes of estimating or securing the payment of the sum to be paid by the insurer, affect the question whether the agreement between them is a contract of insurance. All that is requisite to constitute such a contract is the payment of the consideration by the one, and the promise of the other to pay the amount agreed

¹ De Assecur. not. 1. See also Bynkershoek’s *Laws of War*, Du Ponceau’s ed. 164. “Insurance is a contract by which the one party, in consideration of a price paid to him, adequate to the risk, becomes security to the other, that he shall not suffer loss, prejudice, or damage by the happening of the perils specified to certain things which may be exposed to them.” Per Mr. Justice Lawrence, in *Lucena v. Crawford*, 2 Bos. & Pul. New Rep. 300, after citing the definitions of Valin, Roccus, and others.

upon in the contract, or to be determined upon investigation, of loss to the person entitled to claim it, upon the happening of the contingency contemplated in the contract.¹

§ 2. **Contract of Indemnity.**—It had its origin in the necessities of commerce; it has kept pace with its progress, expanded to meet its rising wants and to cover its ever-widening fields, and under the guidance of the spirit of modern enterprise, tempered by a prudent forecast, it has from time to time, with wonderful facility, adapted itself to the new interests of an advancing civilization. It is applicable to every form of possible loss. Wherever danger is apprehended or protection required, it holds out its fostering hand, and promises INDEMNITY. This is the fundamental principle which lies at the basis of the contract, and it can never, without violence to its essence and spirit, justly be made by the assured a source of profit; its sole purpose being to guaranty against loss or damage.² “Though based upon self-interest,” says De Morgan,³ “yet it is the most enlightened and benevolent form which the projects of self-interest ever took. It is, in fact, in a limited sense and a practicable method, the agreement of a community to consider the goods of its individual members as common. It is an agreement that those whose fortune it shall be to have more than average success shall resign the overplus in favor of those who have less. And though it has as yet been applied only to the reparation of the evils arising from storm, fire, premature death, disease, and old age, yet there is no

¹ *Commonwealth v. Wetherbee*, 105 Mass. 149.

² *Wilson v. Hill*, 3 Met. (Mass.) 66; *Kulen Kemp v. Vignes*, 1 T. R. 304, per Buller, J.; *Franklin Fire Ins. Co. v. Hamil*, 6 Gill (Md.), 87; *post*, § 7. L'assurance, nous l'avons dit, a pour objet de réparer une perte soufferte par l'assuré, jamais de lui procurer un bénéfice. Alauzet, *Traité Général des Assurances*, 1 par. 108. Il est de l'essence du contract d'assurance de ne garantir que les pertes souffertes et les dépenses faites; et, sauf conventions contraires, il est de sa nature de les garantir toutes. *Ibid.*, par. 112. On ne peut faire assurer que ce qu'on court risque de perdre; l'assurance ne doit jamais pouvoir donner un bénéfice à l'assuré. Ce principe, que nous avons déjà eu l'occasion d'établir, doit être maintenu avec le plus extrême sévérité. *Ibid.*, par. 146. *Assicuratus non querit lucrum, sed agit ne in damno sit.* Straccha, de *Assecurationibus*, pt. 20, No. 4; Pardessus, *Cours de Droit Commercial*, 1, § 589, 4.

³ *An Essay on Probabilities, and on their Application to Life Contingencies and Insurance Offices.* Pref. p. xv.

placing a limit to the extensions which its application might receive, if the public were fully aware of its principles and of the safety with which they may be put in practice.”

§ 3. Amongst the early writers the peculiar nature of this contract has been the subject of much discussion. The Italian doctors, in particular, have been fruitful in dissertations better adapted, says Boulay-Paty,¹ to fatigue the mind than to throw light upon the subject. With them insurance is now a *nudum pactum*, and now a *contractus innominatus*; now a wager and now a stipulation, a security, a sale, a letting to hire, a partnership, a mandate, and the like; and their several conflicting claims can only be settled by a deep plunge into the theory of the Roman law upon the subject of these several pacts, where we might perhaps lose ourselves in the subtleties of interpretation. But these different characters have been attributed to it according to the point of view occupied by each different writer, and with reference to some special application to a particular subject-matter, rather than in accordance with considerations drawn from the nature of the contract itself. But it is a contract governed by the same principles which govern other contracts.² Like all other contracts it must have its reciprocal consent, and a consideration therefor. “The consent of the contracting parties in all things which constitute the substance of the contract,” says Pothier,³ “is of the essence of the contract of insurance as of all other contracts.” It is, however, a contract peculiar to itself, and distinct from all others in the nature of things,⁴ requiring for its proper elucidation to be interpreted in the light of the circumstances in the midst of which it has grown up, and with a just appreciation of the purposes which it is designed to effect. Such, in point of fact, is the modern view of the contract under the influence of which our judicial tribunals have expounded and enforced the law.

§ 4. A Conditional Contract.—It is, moreover, a conditional

¹ Cours de Droit Commercial et Maritime, tome ii. p. 3.

² Cornfoot v. Fowke, 2 M. & W. 378.

³ Traité de Cont. d'Ass. No. 87.

⁴ Emerigon, Traité des Assurances, c. 1, § 2.

contract; for when no risk attaches no premium is to be paid, or, if paid, must, in the absence of fraud, be returned to the assured.¹ In point of fact, the contract is to pay the premium on condition that the risk is run, and the refunding a premium is of frequent occurrence in maritime insurance; and that, too, in cases where it is entirely optional with the assured whether the property insured shall be put at hazard or not, as when the ship is never despatched by the owner on the projected voyage. The language of Lord Mansfield in *Tyrie v. Fletcher*, above cited, is explicit. "When the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned." And this principle is alike applicable to all policies of insurance. The language of the continental writers, generally, is in accordance with this doctrine. It would seem, therefore, says Alauzet,² that the engagement of the assured is not absolute, but conditional, like that of the insurer; that of the latter depending upon the condition that an accident happen, and that of the former upon the condition that the subject-matter of insurance be put at risk. The Italian writers, however, maintain with great unanimity, that when once the contract has been signed, the premium is absolutely due to the insurer, and is irrevocable; and, reasoning according to the analogies of the contract of sale, which will not permit the purchaser to recant at pleasure, and demand back the purchase-money, ask, with some significance, why the insurer should be made the victim of an act to which he is a total stranger, for which he is in no way responsible, and to which the assured himself is in no way compelled.³ But this strictness of interpretation has not obtained in other and more mercantile communities, where the doctrines of insurance have been developed under the influence of a liberal purpose, so far as consistent with general principles, to foster the spirit of commercial enterprise. In such commu-

¹ *Stevenson v. Snow*, 3 Burr. 1437; *Tyrie v. Fletcher*, Cowp. 668; Pothier, Du Cont. d'Ass. 4; Pardessus, Droit Commercial, 596, 3; 2 Marsh. 663.

² *Traité Gén. des Assurances*, 179.

³ Alauzet, *ubi supra*.

nities the law is jealous of any hindrance in the way of the complete abandonment of an adventure which may have been determined upon and insured, but which, subsequent information may show, would be imprudent or disastrous; and it takes care that the fact of having paid the premiums shall have no influence upon the deliberation whether to proceed or abandon.

§ 5. **An Aleatory Contract.**—It is also what the French writers term an *aleatory*¹ contract, or one in which the equivalent consists in the chances for gain or loss, to the respective parties, depending upon an uncertain event, in contradistinction from a commutative contract, in which the thing given or act done by one party is regarded as the exact equivalent of the money paid or act done by the other.² Each party runs his risks. The insurer will gain the premium if no loss happen; and will be obliged to make reparation if it do. On the other hand, the insured will, in the former case, have paid his premium to no purpose; while in the latter, he will be indemnified for his loss by the insurer.³

§ 6. **A Personal Contract.**—It is also a personal contract. And whether the subject-matter of insurance be a ship or a building or a life, or whatever else it may be, although in popular language it may be called an insurance upon the ship or building or life, or some other thing, yet it is strictly an agreement with some person interested in the preservation of the subject-matter, to pay him a sum which shall amount to an indemnity, or a certain sum agreed upon as an indemnity, in case his interest in the subject-matter shall suffer diminution of value, from certain specified causes, or in certain specified contingencies.⁴ It is a mere special agreement with a party seeking to secure himself against apprehended loss on account of his interest in a particular subject-matter, and not at all incidental to or transferable with the subject-

¹ From *alea*, a die, dice, or throw of the dice; a word for which our adjectives, "gaming" and "hazardous," are not exact equivalents.

² Code Civil, 1104.

³ Rogron, Code de Commerce Expliqué, Title x.; Des Ass. Int.

⁴ *Wilson v. Hill*, 3 Met. (Mass.) 66; *Disbrow v. Jones*, Harr. (Mich.) Ch. 48.

matter.¹ The contract of insurance does not run with the subject-matter of insurance, unless by special stipulations, wholly foreign to itself, either interpolated in the contract itself, or in addition thereto. Satisfaction is to be made to the person insured for the loss he may have sustained; for it cannot properly be called insuring the thing, since there is no possibility of doing it, and therefore must mean insuring the person from damage.² And it is because of this personality of the contract that it has been held that if a mortgagee in possession for condition broken insure his interest in the premises without any agreement therefor between him and the mortgagor, and a loss happens for which the mortgagee is indemnified by the insurers, the mortgagor, on a bill to redeem and for an account, is not entitled to have the amount paid to the mortgagee deducted from the amount of his charges for repairs.³

§ 7. **Of the Nature of the Contract.**—A distinction has sometimes been taken between marine and other insurances, and life insurance, on the ground that while the former have for their object to indemnify for loss, the latter is an absolute engagement to pay a fixed sum on the happening of a certain event, without reference to any damage in fact, suffered by the insured in consequence.⁴ But this distinction is superficial, and rests rather upon the mode of determining the amount of indemnity, than upon any difference in principle. There is the same difference, having reference to the question of indemnity, between valued and open policies in both fire and marine insurance, that there is between an open policy in either and a policy of life insurance. In open policies the question of the amount of the indemnity is left to be de-

¹ *Carpenter v. Providence Wash. Ins. Co.*, 16 Pet. (U. S.) 495.

² *Saddlers Company v. Badcock*, 2 Atk. 554; *Lynch v. Dalzell*, 3 Bro. Par. Cas. 497.

³ *White v. Brown*, 2 Cush. (Mass.) 412; *Cushing v. Thompson*, 4 Red. (Me.) 496. See also *Leeds v. Cheatham*, 1 Sim. 146; *Mildmay v. Folgham*, 3 Ves. 472; *Watson v. Bratton*, in Eq. 1830, cited by Ellis, *Fire and Life Insurance and Annuities*, 155.

⁴ Babbage's "Comparative View of the Various Institutions for the Assurance of Lives," p. 154; *Dalby v. India and London Life Assurance Co.*, 15 C. B. 365; s. c. 28 Eng. L. & Eq. 312.

terminated when the contingency upon which it becomes due shall have happened, while in valued policies and policies on lives the value of the interest which the insured seeks to protect is agreed upon by the parties and inserted in the policy, and so the amount of indemnity which shall become due on the happening of the given contingency is predetermined. The purpose in all cases is alike, — indemnity for the loss of a valuable interest. That in some cases the value is fixed with great precision, while in others it is of such a speculative character as to admit of the greatest latitude of estimate, not to say of conjecture, does not make it the less a valuable interest. There must be this interest to support the contract. This is essential. What it shall be, provided it be valuable, and how its value shall be arrived at, are simply incidental questions; and however they may be answered, do not change the nature of the contract from one of indemnity based upon an interest to be protected, to a mere wager based upon no interest whatever. The analogies between life and marine policies have been matters of frequent judicial observation.¹ When it is said that fire, life, and other insurances, where valued policies obtain, are contracts of indemnity, it is simply intended that to support them the insured must have some interest in the thing insured. The amount of this interest, and the amount to be paid in case of loss, may be fixed by arbitrary agreement, even before the loss, according to the modern practice, if not strictly according to the ancient doctrine, of insurance.²

§ 8. In a comparatively recent case, after much consideration, it was said that the contract commonly called life insurance when properly considered is a mere contract to pay a certain sum of money on the death of a person in considera-

¹ See *post*, chapter on Insurable Interest.

² *Whitney v. Ind. Mut. Ins. Co.*, 15 Ind. 297; *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 44; *Borden v. Hingham Mut. Fire Ins. Co.*, 18 Pick. (Mass.) 523; *Miller v. Eagle Life and Health Ins. Co.*, 2 E. D. Smith (N. Y. C. P.), 268; *Loomis Adm. v. Eagle Life and Health Ins. Co.*, 6 Gray (Mass.), 396; *Bevin v. Connecticut Mut. Life Ins. Co.*, 23 Conn. 244; *Trenton Mut. Life and Fire Ins. Co. v. Johnson*, 4 Zab. (N. J.) 577; *St. John v. Am. Mut. Life Ins. Co.*, 13 N. Y. 31.

tion of the due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance according to the probable duration of the life, and, when once fixed, it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except when bounties have been paid by prosperous offices) the same on the other. This species of insurance in no way resembles a contract of indemnity, and in this respect differs from policies against fire and against marine risks, which are both properly contracts of indemnity,—the insurer engaging to make good, within certain limited amounts, the losses sustained by the assured in their buildings, ships, and effects. In life insurance the loss is sure to come, when the insurance is for the whole life. In marine and fire insurance the loss may not happen within the time covered by the insurance, as is the case under a simple life policy for a limited time. The case of *Godsall v. Baldero*,¹ as to so much of the decision as held that there must be an insurable interest at the time of the death, was declared to have been decided upon a mistaken analogy between life insurance and marine insurance.² And where a policy is effected by a creditor on the life of his debtor, in pursuance of a contract with his debtor, who, however, is no party to the policy, but supplies the money to pay the premiums, in such case, said Stuart, V. C., referring to the case of *Dalby v. India and London Life Assurance Company*,³ although it may be true that the contract is not one of indemnity as between the parties to the policy, it is, nevertheless, one as between the debtor and creditor. So that after the debt is discharged, and the creditor's interest has ceased, the debtor is entitled to any advantages derivable from the policy.⁴ The case of *Dalby v. India and London Assurance Company*,⁵

¹ 9 East, 72.

² *Dalby v. India and London Life Assurance Co.*, 15 C. B. (6 J. Scott) 364, determined in the Exchequer Chamber. And see also *Law v. London Indisputable Life Policy Co.*, 1 Kay & Johns. 223.

³ 15 C. B. (6 J. Scott).

⁴ *Knox v. Turner*, 21 L. T. N. S. 701; s. c. 9 Law Rep. Ch. 155.

⁵ *Ubi supra*.

turned upon the question not whether there should be an insurable interest, which was admitted, but whether that interest should subsist as well at the time of the death as at the time of entering into the contract. That a valuable interest, for the loss of which indemnity might be claimed, must exist at some time, as the support of the policy, was conceded. This case will be further considered when we come to speak of insurable interest.

§ 9. *Reinsurance.*—Reinsurance is merely insurance applied in a special way and to cover in whole or in part a particular risk already assumed. When an insurer finds it prudent or convenient to protect himself from loss by reason of any liability he has assumed under a policy, he may contract with another to relieve him from that liability, and take it upon himself. This is to reinsure; and by the contract the reinsurer, except as to the matter of premium, which may be more or less than that paid on the original policy, as the parties may agree, undertakes with reference to the first insurer what the first insurer undertakes with reference to the insured, and subject to like rights, duties, and obligations.

§ 10. Reinsurance is prohibited in England by statute 19 Geo. II. c. 371; but this prohibition is peculiar to England, and was made not from any objection to the practice when confined to its legitimate purpose,¹—to save the party procuring the reinsurance from the consequences of an imprudent contract,—but from the fact that it came to be perverted into a mode of speculating in the rise and fall of premiums, and might, therefore, be made a cover for wager policies.² But by the law and practice of every country except England the underwriter may have the entire sum he has insured reinsured to him by some other underwriter. It is a common practice in this country.³

§ 11. It is a contract of indemnity to the reinsured, and binds the reinsurer to pay to the reinsured the loss sustained

¹ Arnould Ins. 1, 290; *Andrée v. Fletcher*, 2 T. R. 161.

² Arnould Ins., *ubi supra*.

³ Phil. Ins. c. 3, § 13; *Merry v. Prince*, 2 Mass. 176; *Hastie v. De Peyster*, 3 Caines, 190.

in respect to the subject insured, to the extent for which he is reinsurer.¹ The reinsured, in order to recover against the insurer, must prove his risk or interest in the subject-matter, the fact and amount of loss, in the same manner as the original insured must have proved them against him;² and the reinsurer is entitled to make the same defence to an action brought against him on the second policy as the original insurer might have done on the first policy.³ It is not necessary for the reinsured to pay the loss to the first insured before proceeding against the reinsurer, nor is the liability of the latter affected by the insolvency of the reinsured, or his inability to fulfil his own contract with the original insured.⁴ Nor is it competent, unless so agreed, to limit the liability on a contract of reinsurance by proof of a usage in the place where the contract is made, by which the reinsurer pays the same proportion of the entire loss sustained by the original insured that the sum reinsured bears to the first insurance written by the reinsured.⁵ Where the reinsurer has notice from the reinsured that a suit has been commenced against the latter, and that the former will be looked to for the costs and expenses of defence, and no objection is made by the reinsurer, and the reinsured has just grounds for contesting the claim, the reinsurer will be holden to pay to the reinsured the costs and expenses of such defence in addition to the actual loss. But costs and expenses, wantonly and unnecessarily so incurred, when there is no reasonable ground of defence, and when there is no express or implied sanction of the defence by the reinsurer, cannot be recovered by the reinsured.⁶ And a party obtaining a policy of reinsurance is bound to communicate all facts within his knowledge, with reference to the character of the original insured, material to the risk; and if he neglect to do so, whether from

¹ *Hone v. Mut. Saf. Ins. Co.*, 1 Sand. Superior Ct. Rep. (N. Y.) 137.

² 2 Kent, Com. 279.

³ *New York Mar. Ins. Co. v. Prot. Ins. Co.*, 1 Story, C. C. R. 458; *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443.

⁴ *Hone v. Mut. Saf. Ins. Co.*, 1 Sand. Superior Ct. Rep. (N. Y.) 137.

⁵ *Ibid.* And see s. c. affirmed, 2 Comst. (N. Y.) 235.

⁶ *New York State Mar. Ins. Co. v. Prot. Ins. Co.*, 1 Story, C. C. R. 458; *Hastie v. De Peyster*, 3 Caines (N. Y.), 190.

design or misapprehension of their materiality, the policy of reinsurance will be void.¹ The notice of loss from the original insured to the reinsured, if sufficient, and it be immediately forwarded to the reinsurer, will be sufficient notice to the latter.²

§ 12. "The original contract," says Emerigon, "subsists precisely as it was made, without renewal or alteration. The reinsurance is absolutely foreign to the first insured, with whom the reinsurer contracts no sort of obligation. The risks which the insurer has assumed constitute between him and the reinsurer the subject-matter of the contract of reinsurance, which is a new contract, totally distinct from the first.³ It cannot, therefore, be made with the party first insured, for this would be a simple rescission of the contract; nor does the latter by it acquire any rights against the reinsurer, in case of the insolvency of the reinsured, or any claim upon the money to be paid to the latter.⁴ If the insurer be not liable, he cannot recover of the reinsurer, for the reason that the insurer has no insurable interest, and can suffer no loss, where there is no liability.⁵ Where in a policy of insurance there is a stipulation that the reinsurer is to be liable only for his proportion of the loss, if there shall be other insurance; other insurance means, other insurance of a like kind, that is, other reinsurance.⁶

§ 13. **Double Insurance.**—When two or more policies are taken out upon the same interest, it is called double insurance. Policies usually contain a clause that in case of other insurance, that is, double insurance, the several insurers shall be liable, each to such a proportion of the loss as the several

¹ New York Bow. F. Ins. Co. v. New York Fire Ins. Co., 17 Wendell (N. Y.), 359.

² Ibid.

³ Emerigon, *Traité des Assurances*, c. 8, § 14; *Herckenrath v. Am. Mut. Ins. Co.*, 3 Barb. (N. Y.) Ch. 63.

⁴ Alauzet, *Traité Général des Assurances*, 152.

⁵ *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443; *New York Mar. Ins. Co. v. Prot. Ins. Co.*, 1 Story, C. C. R. 458; *Carpenter v. Providence Ins. Co.*, 16 Pet. (U. S.) 495; *Del. Ins. Co. v. Quaker City Ins. Co.*, 3 Grant's Cases (Penn.), 71.

⁶ *Mut. Saf. Ins. Co. v. Hone*, 2 Comst. (N. Y.) 235.

amounts insured bear to each other. This prevents the recovery of more than the whole loss by the insured. And if there were no such provision, since the insured is only entitled to an indemnity, he can recover no more than this, however much may be the amount. He may, however, resort to any one of the insurers to recover his whole loss; and in that case, the insurer paying the loss will have claims over against the other insurers for their respective proportions, the several concurrent insurers being regarded as identical in interest.¹ This question of double insurance will be further and more particularly considered when we come to speak hereafter of conditions with reference to other insurance.

¹ *Gordon v. London Assurance Co.*, 1 Burr. 492; *Lucas v. Jefferson Ins. Co.*, 6 Cow. (N. Y.) 635; *Stacy v. Franklin Fire Ins. Co.*, 2 W. & S. (Penn.) 506; *Newby v. Reed*, 1 W. Black. 416; *Peoria Marine & Fire Ins. Co. v. Lewis*, 18 Ill. 553; *Baltimore Fire Ins. Co. v. Lovey*, 20 Md. 20; *Sloot v. Royal Ins. Co.*, 49 Penn. St. 14; *Merrick v. Germania Fire Ins. Co.*, 54 Penn. St. 277.

CHAPTER II.

OF THE FORM OF THE CONTRACT AND THE PARTIES THERETO.

§ 14. **Contract may be by Parol.** — However great may be the inconvenience to the parties, and however injudicious it may be to leave the terms of the contract to the uncertainties of even the most accurate and retentive memory, it seems, nevertheless, that a contract of insurance, the terms of which are not in writing, is sufficient to bind the parties, when there is no statute law to the contrary.

A recent learned writer,¹ indeed, doubts whether an action upon a contract merely oral would be now sustained, since the usage of written contracts has become so ancient and so universal that it may be considered to have acquired the force of law. And this view seems to have been adopted to its full extent in a late case in the Supreme Court of Ohio.² In this case the court holds the following language by Reed, J.: "Insurance is a branch of the law-merchant, and its nature and principles spring from commercial usage, to which we are to look for the forms and modes in which it is reduced to practical action, in cases not determined by positive decisions or the rules of municipal law. The form of giving effect to the indemnity is by a written instrument, containing the consideration, terms, and stipulations of the contract of indemnity between the underwriter and insured, called a policy. It is universal commercial usage, that this policy shall be in writing, and there is no exception to it in positive decision or municipal regulation. Such a thing as a verbal policy is unknown to the law of insurance. All the books upon the subject, and decisions, unite in declaring that the policy must be in writing. And in every instance where the municipal law

¹ 1 Duer, Ins. 60.

² Cockerell v. Cincinnati Mut. Ins. Co., 16 Ohio, 148.

has created and empowered corporations to enter upon the business of insurance, it has required that the contract of insurance, or the policy, should be in writing, and signed by the parties to be bound. It is so in the act incorporating the insurance company now in question. To hold that there could be such a thing as a verbal policy would be contrary to all commercial usage, and the authority of all the books and decisions, and in this case would be in opposition to the spirit and express requirements of the act of our legislature creating the company." "But without the act, we should hold that a policy of insurance upon the principle of general usage must be in writing, as supported and declared by universal adjudication."

In this case a policy had been issued and had become void by a sale of the property. The real question at issue was, whether a parol agreement would revive it. If by the last clause of the opinion just referred to it is intended that the contract to insure must be in writing, as declared by universal adjudication, it will be seen hereafter that the statement cannot be accepted as a correct one. Nor will the intimation of the court, that a non-compliance with the statutory requisitions as to the mode of making the contract is fatal to its validity, be found to be supported by the majority of the adjudged cases or the weight of authority.

It is doubtless generally true that a corporation cannot by its own act enlarge its own capacities, powers, or rights; but it would be strange to say that it cannot thus voluntarily incur *liabilities*. If a corporation by a corporate act appoints an agent under any name or title whatever, for the purpose of making, in its own behalf, any contract which it has a right to make, can the corporation itself impeach such a contract, made in its name by that agent, by alleging its own want of power to make such an appointment, or to contract by such an agent? Such a doctrine is in violation of all principle.¹

§ 15. Even an express provision in the act of incorporation that policies subscribed by the president and countersigned by

¹ Bulkley v. The Derby Fishing Co., 2 Conn. 254. And see also Fuller v. Boston Mut. Fire Ins. Co., 4 Met. (Mass.) 206.

the secretary, or however else, shall be binding on the corporation, merely specifies one sufficient mode of making the contract, and affords no just inference that this mode is exclusive of others, or that contracts not in writing are invalid.¹

§ 16. The ancient stringency of the common law required that corporations should execute their contracts under their corporate seal, and held that they could only thus contract. But this doctrine is now exploded.² And the language of the statutory provisions referred to would seem to intend rather to give to the modern doctrine the force of legislative sanction, than to preclude such corporation from the right to contract under the corporate seal, if they please, or to designate any particular mode which alone shall be binding upon them. The insured is also relieved from the necessity of proving affirmatively that the particular officers are clothed with power which authorizes them to contract for the corporation.³

§ 17. And such, no doubt, is the spirit of the later English

¹ Trustees of First Baptist Church in Brooklyn v. Brooklyn Fire Ins. Co., 19 N. Y. (5 Smith) 305; Constant v. The Alleghany Ins. Co., 3 Wallace (U. S. C. C.), 313; s. c. Am. Law. Reg. n. s. 1, 116. See also New England Mut. Ins. Co. v. De Wolf, 8 Pick. (Mass.) 62; City of Davenport v. Peoria Marine and Fire Ins. Co., 17 Iowa, 276. That the current of foreign authorities is in the same direction, see *post*, §§ 20, 21. In Lower Canada, however, it has been held that the mode specified in the charter is exclusive. Mutual Ins. Co. v. McGillevray, 9 Lower Canada, 488, reversing s. c. 8 Lower Canada, 401; while in Upper Canada it was held, that although under a clause in the charter which provided, "Any policy signed by the president and countersigned by the secretary, but not otherwise, shall be deemed valid and binding on the company," a policy issued without the signature of the company was invalid, and the company would not be liable in a suit upon such a policy, yet they could be compelled to execute a valid policy as of the date when this invalid policy was issued. Perry v. Newcastle Dist. Mut. Fire Ins. Co., 8 Upper Canada, Q. B. 363. In Henning v. United States Ins. Co., 47 Mo. 430, it was held that a company whose charter provides that "all the conditions of policies issued by said company shall be printed or written on the face thereof," and whose by-laws provide that "the president shall sign all policies or other contracts by which the company are bound;" and also that, "every proposal for insurance shall be by written application, signed by the applicant or his agent," could not make an original and binding contract by parol. See also *post*, § 23 *et seq.*

² 2 Kent's Com. 288; Bank of Columbia v. Patterson, 7 Cranch, 299; Hamilton v. Lycoming Mut. Ins. Co., 5 Barr (Penn.), 339; s. c. 10 Law Reporter, 448; Copper Miners v. Fox, 3 Eng. Law & Eq. Rep. 420.

³ Safford v. Wyckoff, 4 Hill, 446, Walworth, Ch.

cases. In *Prince of Wales Life and Educational Assurance Company v. Harding*,¹ which was a case where the charter provided that the seal of the company should not be affixed to policies except by the written order of three directors, and a policy was issued under seal but without any order of the directors; such a policy was, however, held to be valid and binding upon the company, for reasons substantially the same as those given in the American decisions. The object of the legislature was said to be, for the better protection of the stockholders, to impose upon the directors the duty towards them of observing certain formalities. If they failed in that duty they would be liable for their negligence to the stockholders, but the absence of the prescribed formality would not render the contract void as against the company.²

§ 18. But corporations are not the only underwriters. Private individuals may insure; and if a party, for a good consideration, should take upon himself the risk of theft, upon a quantity of specie in its passage from one port to another, and it should be stolen, a court of justice would doubtless hesitate long before it would sustain the defendant's refusal to indemnify, on the ground that the contract was merely oral, against the irresistible equity of the plaintiff's claim. Usage, it is said, requires it. But aside from the fact that usage may be waived by the consent of parties, its requisitions cannot be said to be so inexorable as virtually to import a new clause into the Statute of Frauds.³

§ 19. It is not denied, however, that by the principles of the common law a verbal agreement would be sufficient, and it seems difficult to see why a party, in the absence of any statutory regulations to the contrary, may not be heard in a

¹ 1 E. B. & F. 183.

² See also *Collett v. Morrison*, 9 Hare, 162.

³ Even the Supreme Court of Ohio, although it has several times referred to the case of *Cockerell v. Cincinnati Mut. Ins. Co.*, 15 Ohio, 148, with apparent approval, has, in a later case (*Palmer v. Medina Ins. Co.*, 20 Ohio, 529), apparently taken it for granted that a contract to insure need not be in writing. A contract for insurance for a year, or from year to year, is not within the Statute of Frauds. *Walker v. Metropolitan Ins. Co.*, 56 Me. 471; *Trustees of First Baptist Church in Brooklyn v. Brooklyn Fire Ins. Co.*, 19 N. Y. (5 Smith) 308; *Sanborn v. Fireman's Ins. Co.*, 16 Gray (Mass.) 448.

court which administers the law to which he appeals, and which can find nothing in its principles adverse to his claim. It was accordingly said, in *McCullock v. The Eagle Insurance Company*,¹ to be certain that if a contract be made, the mere want of a policy will not prevent the plaintiff from recovering. And more recently, Mr. Chancellor Walworth, after remarking that the Stamp Laws in England, and the respective Codes of France and Spain require that the contract be in writing, observes,² that the assertion of Millar,³ that the importance of the contract of insurance, and the singularity of those obligations which it is intended to create, have in all commercial countries rendered a deed in writing essential to its validity, is unsupported by authority, and adds: "I have not been able to find any thing in the common law of England rendering it absolutely necessary that contracts for insurance should be in writing, although the custom has been, so far as I can ascertain, to have some written evidence of the agreement to insure. A policy of insurance necessarily imports a written contract, as the name of the instrument, derived from the Italian, implies. I am not prepared to say, however, that in this State there may not be a valid parol agreement, founded upon a good consideration, to execute a written policy of insurance, which a court of equity may enforce, although there is no written evidence whatever of the agreement, or of any of its stipulations or conditions."

§ 20. In a still later case,⁴ the question again arose, and was decided in favor of the validity of a parol agreement for a policy, citing and approving on this point the case of *McCullock v. The Eagle Insurance Company*. It was also said in the same case by Chief Justice Gibson, that, a few years previous, an action on an agreement for a policy against fire was tried before him, and a recovery had, without objection on the ground that it was a parol contract, though the counsel re-

¹ 1 Pick. (Mass.) 278.

² *Sandford v. Trust Fire Ins. Co.*, 11 Paige, 547.

³ *Ins.* 30.

⁴ *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Barr (Penn.), 339; s. c. 10 *Law Reporter*, 498.

tained by the corporation were amongst the soundest lawyers at the Philadelphia bar.¹ Nor even in France, although the *Code de Commerce* requires that the contract be reduced to writing, would a verbal agreement be *ipso facto* null and void. Any written evidence that an agreement has been made, will let in the plaintiff to show what the contract is ; and even this is not necessary unless the defendant deny that there ever was any agreement of any kind.² And if he do deny, the better opinion is that he may be put upon his oath ;³ which, however, Emerigon does not admit.⁴

§ 21. "Writing cannot be regarded," says Alauzet,⁵ "as necessary to the validity of the contract of insurance." "This form," says Pothier, "is absolutely foreign to the substance of the contract." And Merlin afterwards held it to be clear that writing was only necessary to establish the existence of the contract against those who would deny it. The law, in truth, cannot change the essence of a contract which it has not created, and which exists independently of it, because it is of the law of nations. But it is entirely competent to our law to regulate the conditions necessary to the proof of the contract ; and under this relation it becomes a contract subject thereto. To say, however, that insurance itself shall have no existence except under these conditions,

¹ See also *Perkins v. Washington Ins. Co.*, 4 Cowen, 646 ; *Lightbody v. N. A. Ins. Co.*, 23 Wend. 18 ; *Smith v. Odlin*, 4 Yeates, 468 ; *Thayer v. Middlesex Mut. Ins. Co.*, 10 Pick. (Mass.) 326 ; *Luciani v. Am. Fire Ins. Co.*, 2 Whar. (Penn.) 167 ; *Union Mut. Ins. Co. v. Commercial Mut. Ins. Co.*, 2 Curtis (U. S. C. C.), 524 ; s. c. 19 Howard (U. S.), 318, affirmed.

² Rogron, *Code de Commerce Expliqué*, art. 332, note ; Alauzet, *Traité Gén. des Assurances*, 181, 401, who cites Pothier, Merlin, and others.

³ *Ibid.*

⁴ *Traité des Assurances*, c. 2, § 1. In Holland the doctrines of fire, marine, and other insurance have been incorporated into the Commercial Code. The twelfth article of title 9, the 257th of the Code, is as follows : The contract of insurance subsists as soon as the agreement has been determined between the parties, and the reciprocal rights and obligations of the insurers and the insured commence from that moment, even before the signature of the policy. The contract imports the obligation of the insurers to sign the policy within the time agreed upon and deliver it to the insured. Rogron, *Code de Commerce Expliqué*, p. 245. Le Guidon, art. 11, c. 1, speaks of parol agreements to insure, and prohibits them.

⁵ *Ubi supra.*

and that one of the parties may admit all the allegations of the other and yet refuse to comply with the terms of the contract because it is not in writing, would be to establish an abuse, against truth and the nature of things. The *Code de Commerce* is far from containing any such provision; and always when it has made any requirement on pain of nullity, it has expressly said so. It is well known what chaos has been introduced into another branch of the law, by the technical distinction between forms which are substantial and those which are not; between those prescribed on pain of nullity and those which are only directory. Nothing of the like exists in commercial law. If the Code does not pronounce nullity expressly, clearly, and in a peremptory manner, it cannot be invoked. In such cases equivalents may be substituted for its prescriptions."

§ 22. It was said, in *The Trustees of the First Baptist Society in Brooklyn v. Brooklyn Fire Insurance Company*, that an agreement that an existing policy for a year should be in existence from year to year after its expiration, may be by parol, and yet be valid, as the reasons which require policies to be in writing do not apply to such an agreement.¹ What these reasons are, do not appear in the opinion of the court, and it may well be doubted if any distinction like that so intimated does in fact exist. The cases already cited are strictly cases of agreements looking to the issue of a policy; and most of the terms of the several agreements are in some form in writing. But the case of the *Mobile Marine Dock and Mutual Insurance Company*,² was less embarrassed by written evidence of any kind. In this case there was a simple memorandum in figures,³ alleged to be in the handwriting of the secretary of the insurance company, and the offer was, to show by this and oral evidence that a contract of insurance against fire was made between the parties. The insurers objected that both the

¹ 18 Barb. (N. Y.) 69.

² 31 Ala. 711.

³ This memorandum was as follows:—

" 5250 . . 7 d'ys . . 1-8 . .	6.56
4650 . . 2 „ . . 1-20 . .	2.32
9900. 3-16 to N. O.	18.56 — \$27.44."

memorandum and the oral evidence were inadmissible, on the ground that it was not competent by parol evidence to establish a contract of insurance. But the court held that an oral agreement for insurance against loss on goods by fire was valid. And the New York Court of Appeals,¹ although the case before it was rather one of the renewal of a contract, the terms of which were fixed in writing, than the making of a new one, has recently broadly asserted, that, "to deny that parol agreements to insure are valid, would be simply to affirm the incapacity of parties to contract, when no such incapacity exists according to any known rule of reason or of law." The distinction above referred to, suggested by the court below, in the same case, seems to have been disregarded. And such parol agreement takes effect forthwith, although entered into contemporaneously with an agreement by the insurers to deliver, and the insured to accept and pay for, as a substitute therefor, a policy in writing in the usual form, and remains in force till the delivery or tender of such policy. And until then the condition usually inserted in such policies, making prepayment of the premium necessary to the validity of the contract, has no operation by implication.² And a mere demand of the premium, without a tender of the policy, will not relieve the insurers from responsibility under such parol agreement.³ And under it the insured may recover, although he may have received a policy, in pursuance of the agreement, if by its terms such policy becomes valid only on being countersigned by the agent, and in fact has not been so countersigned.⁴ And the rule of damages is the same as under a written policy.⁵

§ 23. In the case of *Sanborn et al. v. Firemen's Insurance Company*,⁶ the point was again distinctly made that the contract of insurance is required to be in writing, and that a suit at law is not maintainable on an oral agreement, and was

¹ *Trustees of the First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305.

² *Kelley v. Commonwealth Ins. Co.*, 10 Bosw. (N. Y.) 82.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Rockwell v. Hartford Fire Ins. Co.*, 4 Abb. Pr. Rep. (N. Y.) 179.

⁶ 16 Gray (Mass.), 448, decided in 1860, but not published till 1871.

elaborately considered, and all the authorities reviewed, and the conclusion to which the court arrived was, that no principle of the common law requires that this contract, any more than any other simple contract made by competent persons upon a sufficient consideration, should be evidenced by a writing. And in this case the oral agreement was upheld, although the charter of the defendant company provided that they should have a right to make contracts by the signature of the president for the time being, or by the signatures of such other persons and in such form and with such ceremonies of authentication as they may by their rules and by-laws direct, the court regarding this provision of their charter as merely enabling, and not restrictive of the general power to effect contracts in any other lawful and convenient mode,—a view which must now be considered as the well-settled doctrine by the nearly universal concurrence of the authorities. The distinction between a contract to insure or to issue a policy of insurance and the policy itself, is obvious, and constantly recognized by the courts. The former may be by parol or in any form. The latter may be regulated and controlled by statutes or by the by-laws of the company issuing it.¹

§ 24. The certificate of the secretary of an insurance company given to a policy-holder, setting forth the consent of the directors that the policy already issued shall cover property not originally embraced by the policy, is evidence of a con-

¹ *Rhodes v. Railway Passengers Ins. Co.*, 5 Lansing (N. Y.), 71; *Walker v. Metropolitan Ins. Co.*, 56 Me. 471; *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351; *Kennebec Co. v. Augusta Ins. and Banking Co.*, 6 Gray (Mass.), 204; *Baxter v. Massasoit Ins. Co.*, 13 Allen (Mass.), 320; *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216; *Western Massachusetts Ins. Co. v. Duffey*, 2 Kan. 347; *Commercial Mut. Mar. Ins. Co. v. Union Mut. Ins. Co.*, 2 Curtis (U. S. C. C.), 524; s. c. affirmed in the United States Supreme Court, 19 How. 318; *Security Fire Ins. Co. v. Kentucky Mar. and Fire Ins. Co.*, 7 Bush (Ky.), 81. In Missouri, in the case of *Henning v. United States Ins. Co.*, decided as late as March, 1871, the court, while apparently inclined, after a review of the authorities, to yield the point that a parol contract is valid, there being nothing in the charter relative to the mode of contract, still held that when the act of incorporation requires that the president shall sign all policies, and that all proposals for insurance shall be by written application, signed by the applicant or his agent, the specified mode of contract is the only competent one.

tract of insurance upon the property mentioned in the certificate.¹

And for reasons already stated in considering the question of the validity of parol contracts of insurance, there seems to be no doubt that a verbal agreement to extend the terms of an existing policy, so that it shall cover property not originally within the scope of the contract, would be valid.²

§ 25. Whether it would not be too much to say that, in England, a parol agreement for insurance would be void, may at least be doubted.³ In *Morgan v. Mather*,⁴ it was indeed held, that a contract of insurance, not in writing, would be void as an evasion of the stamp-duty. But cases may be easily conceived where no such evasion is intended; as, for instance, a verbal agreement upon the terms, and a loss before the terms agreed upon are committed to writing, with a refusal on the part of the insurer to execute and deliver the policy. The stamp laws, moreover, do not go to the validity of the contract. They do not require any description of contract to be reduced to writing for the purpose of being stamped; they simply provide that when expressed in writing, this paper parchment, or vellum, upon which the contract is written, shall not be received in evidence, or have any legal force or validity, unless a stamp of a specific value and amount has been affixed to it.⁵ But it may happen, in a variety of cases, that the transaction is such that it may be proved by other evidence than the written instrument; and the objections arising from the stamp acts may be avoided by a resort to another species of proof.⁶ The doubt expressed in *Western Massachusetts Insurance Company v. Duffey*,⁷ as to whether the stamp act does not require that the contract be in writing, seems not to be well-founded. It may be here stated that the State courts do

¹ *Goodall v. New England Fire Ins. Co.*, 5 Foster (N. H.), 169.

² *Wood v. Rutland and Addison Mut. Fire Ins. Co.*, 31 Vt. (2 Shaw) 552.

³ *Salvin v. James*, 6 East, 571.

⁴ 2 Ves. Jr. 18.

⁵ Addison on Contracts, 119.

⁶ Comyn on Cont. pt. 1, c. 3, p. 45; Phillips on Evidence, c. 9; Chitty on Cont. 115.

⁷ 2 Kan. 347.

not recognize the constitutional right of the general government to determine the rules of evidence by which the former shall be governed, and hold, pretty uniformly, that the law of Congress declaring that no instrument shall be admitted or used as evidence in any court without being duly stamped applies only to the courts of the United States.¹ Whether it is within the power of Congress to declare unstamped contracts wholly void is a question of some doubt. That it is not has been declared in Illinois² and in Kentucky.³ But it is doubtful if this will become the settled view of the law upon mature consideration.⁴ It is also very generally held that under United States Statutes, 1864, c. 173, § 163, and 1865, c. 78, only those unstamped instruments can be said to be void where the stamp has been omitted with intent to defraud the revenue.⁵ And such is the law under the statute of 1866, c. 184, § 9.⁶

§ 26. The laxity and informality of a policy of insurance have been frequently the subject of judicial animadversion. "Courts of law," said Mr. Justice Buller,⁷ "have always considered a policy of insurance as an absurd and incoherent

¹ *Carpenter v. Snelling*, 97 Mass. 452; *Hitchcock v. Sawyer*, 39 Vt. 412; *Dudley v. Wells*, 55 Me. 145; *McGovern v. Hoesback*, 53 Penn. St. 177; *Griffin v. Rannay*, 35 Conn. 239; *Craig v. Dimmick*, 47 Ill. 308; *Bunker v. Green*, 48 Ill. 243; *United States Express Co. v. Haines*, ib. 248; *Twitchell v. Commonwealth*, 7 Wall. (U. S.) 321; *Green v. Holway*, 101 Mass. 243. In *Edeck v. Ranier*, 2 Johns. (N. Y.) 423; and *Plessinger v. Dupee*, 25 Ind. 419, where unstamped instruments were excluded, the question of constitutional competency was not raised.

² *Latham v. Smith*, 45 Ill. 29.

³ *Hunter v. Cobb*, 1 Bush (Ky.), 239.

⁴ *License Tax Cases*, 5 Wall. (U. S.) 462; *Pervear v. Commonwealth*, ib. 475; *Green v. Holway*, 101 Mass. 243.

⁵ *Tobey v. Chipman*, 13 Allen (Mass.), 123; *Willey v. Robinson*, ib. 128; *Govern v. Littlefield*, ib. 127; *Lynch v. Morse*, 97 Mass. 458; *Whitehill v. Shickle*, 43 Mo. 537; *Hallock v. Jaudin*, 34 Cal. 167; *Harper v. Clark*, 17 Ohio St. 190. See also cases in Maine, Vermont, and Pennsylvania, before cited in this section. *Contra*, *Hugus v. Strickler*, 19 Iowa; *Miller v. Morrow*, 3 Coldw. (Tenn.) 587; *Maynard v. Johnson*, 2 Nevada, 16; *Wayman v. Torreyson*, 4 ib. 124; which hold that unstamped instruments, without such intent, are void.

⁶ *Green v. Holway*, 101 Mass. 243. This case contains a valuable summary of the stamp laws, and of the adjudications thereon.

⁷ *Brough v. Whitmore*, 4 T. R. 206.

instrument." "Policies of insurance," said Chief Justice Marshall,¹ "are generally the most informal instruments which are brought into courts of justice." But length of time and a multitude of judicial decisions, embracing almost every important word in the ancient though inaccurate form, have at length so settled the force and meaning of its different parts, that any serious attempt to alter or reconstruct with reference to greater certainty or symmetry would doubtless lead to new doubts and new litigation, and should be admitted only after the most careful consideration.² Lord Mansfield said he did not recollect an addition which had not created doubts upon its construction; and in this country, it would seem that attempts to reform have been attended with no better success.³

§ 27. **The Form Unessential.**—No particular form, however, is absolutely necessary. A policy may be in the form of a bond, or in any other form, provided its scope and meaning import an insurance.⁴ Policies are sometimes executed both in this country and in England, under seal, though this practice is chiefly confined to companies of long standing, which can trace their existence back to the time when it was held that corporations could only contract in that manner. But policies are now common in England signed by three of the directors of the company, and with us it is the very general practice to provide, in acts of incorporation, that policies signed by the president and countersigned by the secretary, shall be binding. In fact any person may engage in the business of insurance, and his contracts relative thereto, whether in writing, or, as we have just seen, by parol, will be valid. It is well, however, though perhaps not necessary, when policies are under seal, and contracts by the parties thereto are made to vary or continue the original contract, that these also should be under seal, whether indorsed upon the back of the policy or not.⁵

¹ *Yeaton v. Fry*, 5 Cranch, 335.

² Per *Ld. Mansfield*, *Simon v. Boydel*, Doug. 268.

³ *Phillips on Insurance*, vol. i. c. 1, § 2.

⁴ *Kent v. Bird*, Cowp. 583; *Pullen v. Glover*, 12 East, 124; *Roebuck v. Hamerton*, Cowp. 737.

⁵ *Raimes v. Knightly*, *Skinner*, 54; *Luciani v. Am. Mut. Fire Ins. Co.*,

A modern policy of fire insurance, it has been well said, is a very complicated contract. Before executing almost any other instrument of equal perplexity, the parties would deem it necessary to take the advice of counsel. Questions frequently arise as to the proper construction of the terms used, which divide the opinions of the most learned jurists.¹ And it may be added that the indifference, not to say culpable negligence, of too confiding applicants, who often enter into contracts of this kind as they would into no others, without being aware, except in the most general way, of their terms and conditions, has produced, and is producing, the most serious disappointments in the shape of litigation, always expensive and vexatious, and not unfrequently fruitless and disastrous. Yet such disappointments are but the natural results of a want of care and foresight; and by the exercise of these they may be, to a very great extent, avoided.

§ 28. Policies have sometimes been so loosely worded as to leave it doubtful whether the obligatory clause imported a promise. In *Alchorne v. Saville*,² a question arose whether a clause in the policy declaring that "the trustees and directors of the company whose names are hereunto subscribed, do *order*, *direct*, and *appoint* the directors of the time being of the said company to raise and pay," &c., was sufficient upon which to found an action of covenant; and it was held that the words imported merely an order to pay, by which neither the parties who executed the policy, nor those to whom it was directed, were bound. Where, however, it was *declared* by the policy, that, in case of loss, the society was to pay, and it was further *stipulated* and *declared* that the directors should not be liable except under the articles establishing the society, one of which was that losses were to be made good within ninety days, the court refused the defendant's motion to arrest judgment on the ground that there was no agreement, and held that the action would lie.³

2 Whar. (Penn.) 167; *Head v. Prov. Ins. Co.*, 2 Cranch, 127; *Robinson v. Tobin*, 1 Stark. 336.

¹ *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517.

² 2 Morse, 202.

³ *Andrewes v. Ellison*, 6 Moore, 199.

A covenant to pay a certain amount, in case of loss or damage, out of the money raised by the first instalments, or calls on shares in the company, is a simple covenant to pay, not limited or qualified by the condition precedent that there should be funds in hand arising from calls or shares sufficient for that purpose. The liability of the company does not at all depend upon the question from what source the funds to discharge it are to come, or on the question whether or not there are any funds.¹

§ 29. But although it may now be considered as settled that a verbal agreement would be valid, and that the particular form of the contract is of secondary importance, yet it is the almost universal practice to embody the terms of the contract in a written instrument called a POLICY.² This should contain the names of the contracting parties; of the *insurer*, who signs or underwrites the policy, and hence is frequently termed the *underwriter*, whereby he obligates himself, in consideration of a certain sum, called the *premium*, to him paid by the other party, to take upon himself the hazard, called the *risk*, and to make good to him the particular loss he may sustain; and of the *insured*, who pays the premium to secure this indemnity against loss. It should also contain the precise time from which the risk commences and at which it terminates; a description of the property, or life, or other subject-matter of insurance; the conditions to which the contract is subject; the limitations upon the risk; and, in short, all such facts and data about which disputes may arise, not susceptible of settlement by resort to the general principles which govern the contract. In practice the description of the subject-matter, except in a general way, and the conditions, are not usually incorporated into the body of the policy proper. The former is contained in a separate paper termed the *application* or *declaration*, deposited with the underwriter by the party applying for insurance, while the latter are indorsed upon the back of the policy. They are both, however, made component parts of the policy by reference,³ and constitute its most essential

¹ Pelbrow v. Atmospheric Railway Co., 5 C. B. 440.

² For form see Appendix.

³ Worsley v. Wood (in error), 6 T. R. 710; Routledge v. Burrell, 1 H. B.

features, requiring the especial consideration of the party seeking protection. It is not unusual to insert in the policy a special clause called the *memorandum*, exempting the insurer, either wholly or partially, from liability for loss or damage to certain specified articles, or on account of certain specified causes, or containing some particular condition, limitation, or exemption not contained in the usual form, and which arises out of the circumstances of the particular case.

§ 30. Policies are divided into *valued* and *open*, *wager* and *interest*, *time* and *voyage*. A *valued* policy is one in which the sum to be paid as an indemnity in case of loss is fixed by the terms of the contract; an *open* policy is one in which the sum so to be paid is not fixed, but is left open to be proved by the claimant in case of loss, or to be determined by the parties, and the determination is called the *adjustment of the loss*. The difference between a valued and open policy, in point of *form*, is this, that the blank which is intended to be filled up by the sum at which the parties agree to fix the value of the property insured, and the amount of damages to be recovered in case of loss, as between themselves, is filled up in the former, while it is not filled in the latter, or, at least, is not stated as an agreed valuation, or sum to be recovered in case of loss. The difference between them in point of *effect* is, that under an open policy, in case of loss, the insured must prove the true value of the property insured, while under a valued policy he need never do so, the sum agreed upon being taken as conclusive, unless in cases of *fraud*, or of such excessive overvaluation as to raise a presumption of fraud.¹ And the overvaluation, in

254; *Oldman v. Bewicke*, 2 H. B. 577; *Holmes v. Charlestown Mut. Fire Ins. Co.*, 10 Met. (Mass.) 211.

¹ *Haigh v. De la Cour*, 3 Camp. 319; *Arnould on Ins.* 1, 304; *Alsop v. Com. Ins. Co.*, 1 Sumner, 451; *Feise v. Aquilar*, 3 Taunt. 506; *Carson v. Marine Ins. Co.*, 2 Wash. C. C. 468; *Lewis v. Rucker*, 2 Burr. 1167; *Shawe v. Felton*, 2 East, 109; *Forbes v. Aspinall*, 13 East, 326; *Holmes v. Charlestown Mut. Fire Ins. Co.*, 10 Met. (Mass.) 211; *Young v. Irving*, 9 Scott, N. R. 752; *Coolidge v. Gloucester Mut. Ins. Co.*, 15 Mass. 341; *Lycoming County Mut. Ins. Co. v. Mitchell*, 48 Penn. St. (12 Wright) 372; *Laurent v. Chatham Fire Ins. Co.*, 1 Hall (N. Y. Superior Ct.), 41; *Cushman v. North Western Ins. Co.*, 34 Me. 487; *Borden v. Hingham Mut. Fire Ins. Co.*, 18 Pick. 523. By the French law, the valuation is not conclusive if it exceeds "reasonable limits." Decree of the Court of Aix,

the expressive language of Mr. Justice Yeates,¹ must be "grossly enormous" to admit of any dispute. The agreed value does not, however, admit an insurable interest, and this must be proved to some extent.²

§ 31. **Valued and Open Policies.** — Whether the policy is an open or valued one is sometimes a question of some difficulty. The words "valued at," as qualifying the property insured, are frequently used; but any form of words showing the intention of the parties to fix the value of the property is sufficient. If the property insured consists of a single article, or of separate and distinctly different articles, either in character or value, and the insurance is in a gross sum upon all, as, for instance, ten thousand dollars on one brick house, or upon one brick and two wooden houses, nothing being said of the value, this is not a valued policy. The sum here neither fixes the total value of all, nor the proportionate value of either, and in case of loss of either or all, the question is open for proof as to the amount of the loss.³ But where there is a total loss of an article distinctly valued in the policy, the loss is to be estimated according to the valuation. And if the insurance be upon numerous articles of equal value, under a valuation of the whole, the insured will recover of the whole valuation the proportion which the number lost bears to the whole number insured. As where ten hogsheads of tobacco, specified to be worth one thousand dollars, are insured, the loss of one will give the right to recover one hundred dollars, or the same pro-

Mar. 24, 1830, cited in Rogron, *Code de Commerce Expliqué*, art. 336, n.; Pardessus, *Cours de Droit Com.* 593, 6 & 7; Alauzet, *Traité Général des Assurances*, 221 *et seq.*; Kent's *Com.* 3, 273, n. (*d*) and cases there cited. Boulay-Paty is, however, incorrectly cited. He agrees with the other authors. *Cours de Droit Com. Mar.* tit. 10, § 20. And what are "reasonable limits" is to be determined by the circumstances of each particular case. Probably they would not differ much from the "grossly enormous" overvaluation of Mr. Justice Yeates, or that excessive overvaluation which raises a presumption of fraud, of the other authorities.

¹ *Miner v. Tagert*, 3 Binn. (Penn.) 205.

² *Feise v. Aquilar*, 3 Taunt. 508; s. c. *Hildyard on Marine Ins.* 264; *Kane v. Com. Ins. Co.*, 8 Johns. (N. Y.) 176; *Pleasants v. Maryland Ins. Co.*, 8 Cranch, 55; *Clark v. Ocean Ins. Co.*, 16 Pick. (Mass.) 295.

³ *Laurent v. Chatham Fire Ins. Co.*, 1 Hall (N. Y. Superior Ct.), 41; *Wallace v. Insurance Co.*, 4 La. 289.

portion of the amount insured.¹ A valuation in the application referred to in the policy has the same effect as if stated distinctly in the policy. Thus a policy having this clause: "the amount insured being not more than three-fourths the value of said property, as appears by the proposal of the said insured," is a valued policy.² So where, while there was a printed stipulation in the policy that the loss or damage was to be estimated according to the true and actual cash value of the property at the time of loss, it was written in that the plaintiff was insured "to the amount of \$2,000; viz., on the building and fixed machinery, \$1,700; on movable machinery therein, \$150; on stock, raw and wrought, \$150, — said insured being the lessee of said mill for one year, from Nov. 1, 1850, and having paid the rent therefor, of \$2,171.01, which interest, diminishing day by day, in proportion for the whole rent for a year, is hereby insured," the court held that the policy was a valued one, as to the first two items. If an open policy, neither the plaintiff nor defendant could be benefited in any degree by the insertion therein particularly of the rent paid by the insured to the lessor; it was wholly immaterial and unnecessary; nor, if it was an open policy, was there any occasion to recite that the interest was one diminishing day by day. This was one element in the value of the loss, and one so obvious, especially if the policy was near its expiration, or had run any considerable time, that it could not be expected to be overlooked. And although it was agreed that the loss or damage shall be estimated according to the actual cash value at the time of the loss or damage, still the parties could fix upon a rule, and did, in this case, fix upon a rule by which the cash value was to be determined, not the less a rule because it permitted of variation day by day.³ But where the applica-

¹ *Harris v. Eagle Ins. Co.*, 5 Johns. (N. Y.) 368.

² *Nichols v. Fayette Mut. Fire Ins. Co.*, 1 Allen (Mass.), 63; *Fuller v. Boston Fire Ins. Co.*, 4 Met. (Mass.) 206; *Phoenix Ins. Co. v. McLoon*, 100 Mass. 475.

³ *Cushman v. North Western Ins. Co.*, 34 Me. 487. The policy in this case was dated Nov. 8, 1850; and the fire took place Nov. 23, 1850. The jury returned a verdict assessing the damages, including interest, at \$1,872.12, with a special finding that the loss on movable machinery was \$151.79, and included in the verdict.

tion stated the property to be worth \$1,200, and it was insured for \$800, "being not more than three-fourths of the value of the property described in the application," and the policy also contained the provision that "this company shall in no event be liable beyond the sum insured, nor beyond three-fourths of the actual cash value of the property insured at the time of loss or damage, nor beyond such sum as will enable the insured to replace or restore the property lost or damaged," this latter clause was held to control the former, and to open the question as to value, which otherwise would have been fixed.¹ But a clause, providing that the "company shall not be held to pay any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on said property," is operative only when there is other insurance; and, in the absence of other insurance, does not convert a valued policy, like the one in the case last cited, into an open one.²

§ 32. The same policy may be open as to one article insured and valued as to another. This was the case in *Post v. Hampshire Mutual Insurance Company*,³ where there was an insurance of five hundred dollars on a house valued at seven hundred and fifty, and also of five hundred dollars on furniture, to which no value was fixed. But as the by-laws reserved to the company in this case the right to have a valuation made anew, without regard to the valuation fixed in the policy, they were not concluded by that fixed valuation. It was also the case in *Cushman v. North Western Insurance Company*.⁴

§ 33. **Wager and Interest Policies.** — A *wager* policy is one in which it appears by its terms that the insured has no interest, or, in other words, runs no risk. It is a mere bet, and is known by the insertion of certain clauses, — such as "*without further proof of interest than the policy*," "*interest or no interest*," and their equivalents, — having for their object to relieve the insured from the necessity of proving his interest in case of loss. In England, such policies are prohibited, and such

¹ *Brown v. Quincy Mut. Fire Ins. Co.*, 105 Mass. 396.

² *Luce v. Dorchester Ins. Co.*, 105 Mass. 298.

³ 12 Met. (Mass.) 555.

⁴ *Ubi supra*.

clauses are proof conclusive that the contract is a wager. In this country, however, they are only *prima facie* evidence, and may be explained.¹ An *interest* policy is one in which it appears by its terms that the insured is interested in the thing insured, or, in other words, runs a risk. He has something at stake, and, in case of loss, something to be indemnified for. Policies are usually in this form, and import, unless otherwise expressed, that the assured is interested in the subject-matter.²

§ 34. **Time and Voyage Policies.**—A *time* policy is one in which the duration of the risk is fixed by definite periods of time, as, from January 1st, M., 1852, to January 1st, M., 1853, or for one year from a specified date. A *voyage* policy is one in which the duration of the risk is determined by geographical limits, as from New York to Liverpool, and is applicable to cases of transportation by land, as well as by water.³

§ 35. **Who may be Parties.**—Parties competent to contract generally may be parties to a contract of insurance. The insurers may be private individuals, or companies of associated individuals, and so may the insured. In this country, the business, though previously to the commencement of the present century mostly in private hands, is now almost exclusively in the hands of incorporated companies; and there is a large and increasing class of these based upon the mutual principle, in which the members are at once the insurers and the insured. In England, private underwriting in mercantile insurance is largely carried on by a society of capitalists, who meet daily for the transaction of business at Lloyd's Subscription Rooms, and are hence called members of "Lloyd's." Each member underwrites his name to the policy offered, if he chooses to take any portion of the risk, and against it the amount for which he will be liable in case of loss, with the date of his subscription. Formerly, private underwriting was extensively carried on on the continent of Europe; but there, as well as in England, the superior advantages of public companies are gradually leading to an abandonment of the ancient practice.

¹ *Alsop v. Com. Ins. Co.*, 1 Sumner, 467.

² *Williams v. Smith*, 2 Caines (N. Y.), 13; *Cousins v. Nantes*, 3 Taunt. 513.

³ *Boehm v. Combe*, 2 M. & S. 172.

§ 36. *Disabilities.* — But there may be considerations which temporarily disable parties from contracting. The subjects of two hostile States cannot make a valid contract of insurance, while the war continues.¹ And it has even been held that an English underwriter on French property in time of peace is not liable for a loss occasioned by capture by British ships during hostilities which commenced between Great Britain and France, subsequent to the time when the policy was made, and terminated prior to the bringing of the action.² And it was said, in *Brandon v. Curling*,³ that every insurance on alien property, by a British subject, must be understood with this implied exception, that it shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the insured and the insurer. In such a case, though the contract is legal at the time the risk commences, and the insured cannot therefore claim a return of the premium, yet considerations of public policy are so stringent as to vitiate a once valid contract, by importing into it an implied condition which becomes operative upon a contingency beyond the control of either of the parties.⁴ This last case was decided in the face of a practice which had grown up under the patronage of Lord Mansfield, who went so far as to try causes in which the same question arose, and permitted foreigners in their own names and for their own benefit, during the war, to recover on policies of insurance on foreign goods against British capture. Yet Lord Alvanley, though he could not help animadverting upon the immorality of the defence, felt bound to sustain it, on the ground that no subject can be permitted to enter into a contract to do any thing which may be detrimental to the interests of his own country; and that such a contract is as much prohibited as if expressly forbidden by an act of Parliament. When hostilities commence between the countries of the underwriter and the insured, the former is forbidden to fulfil his contract.

¹ *The Hoop*, 1 Rob. 196; *The Emulous*, 1 Gallison, 571; *Griswold v. Waddington*, 16 Johns. (N. Y.) 438.

² *Gamba v. Le Mesurier*, 4 East, 407.

³ 4 East, 410.

⁴ *Furtado v. Rodgers*, 3 Bos. & Pul. 191.

§ 37. That a subject may not enter into such a contract, is probably more than was meant to be said; for such a contract is certainly legal in its inception, and its invalidity supervenes upon a contingency which he could not foresee. But that he is absolved from any legal obligation to fulfil it, and will not be compelled by the courts so to do, from the moment when it proves to be detrimental to the interest of the State, is now the established law.¹ In *Bell v. Gilson*,² the judges undertook to relax somewhat the severity of the rule, in favor of contracts entered into between British subjects about property purchased of the enemy by a British subject during the war, and held that property so purchased should not be considered as enemy's property. But this case was afterwards overruled, and the disability to contract now extends alike to alien enemies and to subjects dealing in enemy's property. And it appears now to be the law of England, that war between the two countries to which two contracting parties respectively belong, suspends a contract entered into before the breaking out of hostilities, and annuls it if entered into while hostilities continue.³ And it seems that the law will not permit an insurance company to indemnify a policy-holder who has lost his health, life, or property in the service of the enemy, whether loss from such cause be excepted in the policy or not.⁴ And in a recent case in this country,⁵ there was a provision in the policy which exempted the company from liability if the insured entered the military service, and it appeared that he was upon the staff of several generals, though he had no commission. And the court thought this entering the military service within the meaning of the policy; but put the case upon the broader ground of public law, which forbids the insurance of the life of a person who enters into the service of the enemy, and avoids a policy for

¹ See Kent's Com. 3, 255; and *Griswold v. Waddington*, 16 Johns. 438, where the whole subject of contracts between alien enemies is discussed with great ability and research. See also Mr. Du Ponceau's note to his translation of Bynkershoeck on the Laws of War, p. 165.

² 1 Bos. & Pul. 345.

³ *Ex parte Boussmaker*, 13 Ves. Jr. 71.

⁴ *Ex parte Lee*, 13 Ves. Jr. 64.

⁵ *Mitchell v. Mut. Life Ins. Co. of N. Y.*, not reported, but cited in *Bliss on Life Insurance*, 643.

that reason, without any stipulation to that effect, and even though the policy expressly agreed to pay if the death occurred in such service.

§ 38. **Effects of War on Contract.**—The question of the effect of the late civil war in this country upon the relations of parties to contracts generally, though not strictly a question of insurance, has been discussed in several insurance cases, which it may be useful to note in this connection. The general doctrines as applicable to the subjects of belligerent nations have been declared by the Supreme Court of the United States as also applicable to the hostile parties in the late civil war;¹ and by the same court the commencement of the period of belligerency was declared to be the date of President Lincoln's first proclamation for troops, though, in *Leathers v. The Commercial Insurance Company*,² it was held to be the 16th of August, 1861, the date of the proclamation issued by the President in pursuance of the non-intercourse act passed by Congress on the thirteenth day of July preceding; and domicile in the enemy's territory, without regard to personal sympathy, is the test as to the hostile status of the particular individual.³ And the line of demarcation is that claimed and held by the belligerent power.⁴

§ 39. The recent civil war had not the effect to dissolve a contract of life insurance entered into prior to its commencement by parties belonging to the respective belligerents, and kept in force until the breaking out of the war. While in such cases as partnership and affreightment, where the performance is continuous and unremitting until the end of the contract shall have been consummated, and therefore supervening war between the parties disables them from performing any of the incumbent duties, and defeats the object of the contract, a dissolution of the contract is the natural and legal effect of the war, neither the principle nor policy of the law will avoid a pre-existing and valid contract which may be performed by a

¹ Prize Cases, 2 Black (U. S.), 635.

² 2 Bush (Ky.), 298.

³ *Mrs. Alexander's Cotton*, 2 Wall. (U. S.) 404; *New York Life Ins. Co. v. Clopton*, 7 Bush (Ky.), 179.

⁴ Prize Cases, 2 Black (U. S.), 635.

single act, or by periodical acts between which there is nothing to be done, and no continuity of performance, such as the payment of a debt or the payment of premiums. In such a case the suspension of the remedy during the war is the consistent and only legitimate effect of the war. Belligerent policy interdicts the payment because it might aid the enemy in the prosecution of hostilities. Suspension of the performance, therefore, until the restoration of peace, will effectuate the whole aim of the law without dissolving the contract, which may be ultimately enforced in perfect consistency with the principle and end of the temporary interdict. In such a case it is the contract, and not the performance, which is continuing; and the suspension of the remedy, and not a dissolution of the contract, is all that is necessary, befitting, or just.¹ The ordinary contract of insurance does not belong to the class of contracts of continuing performance. It is *sui generis*, governed by a peculiar and rather arbitrary code of the modern common law, but recently moulded, and not yet stamped in all respects with conclusive authority. Its character, however, is so far matured and established as to distinguish it essentially from ordinary commercial contracts, and especially in the effect of war on its pre-existing validity, which the war as a general rule destroys, whether the contract belong to the category of continuing performance or not.² Referring to the cases of *Furtado v. Rodgers* and *Brandon v. Curling*,³ where it was said by the court,—the question arising under a policy of marine insurance,—that policies entered into prior to the war became void by the supervention of war, as in every such policy there was an implied condition that the insurance should not extend to cover any loss happening during the existence of hostilities between the respective countries of the insured and the insurer, the court, in the Kentucky case, observe: “It may be a grave question whether the implied condition as to the perils of war should be extended beyond the belligerent right of capture or destruction by the government of the in-

¹ *New York Life Ins. Co. v. Clopton*, 7 Bush (Ky.), 179; *Hamilton v. Mut. Life Ins. Co.*, 9 Blatch. (C. Ct. U. S.) 234.

² *Ibid.*

³ *Ubi supra.*

surer, and to that extent only we may admit that the continuation of the policy during the war would be illegal, and its pre-existing obligation become avoided. But the principle of this concession would not avoid a policy insuring property which is exempted by law from belligerent power; and while it would avoid a policy insuring the life of one who becomes an actual enemy of the government of the insurer, which had the right to destroy that life, it would not affect the validity of the insurance of the life of a neutral or passive non-combatant, over whose life there is no belligerent power; for though the domicile makes him a technical enemy, whose property may be lawfully captured as enemy's property, yet as such nominal hostility does not subject his life, like his estate, to peril, no belligerent right is affected by the continued validity of the insurance; and, consequently, in such a case neither authority nor principle would avoid a policy any more than if it had insured the life of a child in the cradle, or insured property exempt from capture or confiscation.¹

§ 40. Nor does the occurrence of war revoke the powers of an agent, domiciled in the enemy's country, of a foreign insurance company, having a general agency managed by a board of directors in the country of the other belligerent, by whom the first-mentioned agent is appointed. The Virginia agent appointed by the resident New York agency of a London office is the agent of a neutral, and the contract of insurance effected by the Virginia agent with a citizen of that State in behalf of the company is a contract between a neutral and a belligerent, and the agent's powers are not revoked by the breaking out of war.² And even the agent, resident in one belligerent's territory, of a company established in the territory of the other belligerent, may receive payments of premiums as they fall due, and thus keep alive the policy, though he may not remit

¹ See also *Manhattan Life Ins. Co. v. Warwick*, 20 Grat. (Va.) 614; *Semmes v. City Fire Ins. Co.*, 6 Blatch. (C. Ct. U. S.) 445; s. c. in the Supreme Court of the United States, 13 Wall. (U. S.) 159.

² *Robinson v. International Life Assurance Society of London*, 42 N. Y. 54; *Martin v. International Life Assurance Society of London*, 62 Barb. (N. Y.) 181.

them,¹ and his power may be so far suspended that he cannot negotiate policies.²

§ 41. The Lynchburg Hose Fire Insurance Company v. Knox, was a case where the company sued to recover on a premium note, and the defence was that war had abrogated the contract. But it was held that the war merely suspended the contract.³

¹ New York Life Ins. Co. v. Clopton, 7 Bush (Ky.), 179; Sands v. New Life Ins. Co., 59 Barb. (N. Y.) 556; Manhattan Life Ins. Co. v. Warwick, 20 Grat. (Va.) 614.

² Ward v. Smith, 7 Wall. (U. S.) 452. In Dillard v. Manhattan Life Ins. Co., 44 Ga. 119, it was held that the insured had no right to pay the premiums to the resident agent in Georgia after the war broke out, nor he to receive; and her failure to pay them according to the stipulations of the policy prevented her recovery, not on the ground of forfeiture by reason of the failure, which the court said would be excusable, because to pay would be illegal, but because the company having contracted, if the premiums are paid as stipulated, to pay a certain sum; the premiums not having been so made, no liability had been incurred. But this case is against the current of authorities on both points. The condition in this case was the usual one, that if the premium was not paid as stipulated the policy was to be void. In Howell v. Gordon, in the same State (40 Ga. 392), it is said *obiter* that the war revoked the powers of an agent in Georgia appointed by a citizen of Massachusetts to take care of certain lands in Georgia. Cohen v. New York Mut. Life Co., cited in Bliss on Life Insurance, 646, decided that the powers of a resident agent in Georgia of a New York company were suspended, if not terminated, by the war, so that a tender to him of the premium falling due was not effectual to keep the policy alive. This was decided in 1867, in the Supreme Court of the City of New York, and is said to have been appealed; but the result of the appeal is not yet reported.

³ Superior Court of the city of Baltimore, reported in the Baltimore Law Transcript, vol. i. Oct. 24, 1863. The opinion is given here *in extenso* as worthy of preservation:—

DOBBIN, J. This is a suit instituted by the plaintiff, a corporation created by the laws of Virginia, and having its principal office in Lynchburg, against the defendant, a citizen of the State of Maryland, resident in Baltimore, to recover the amount of a promissory note given for the premium of insurance on the schooner Graham for one year from the 24th of March, 1861, the date of the policy being the 23d of March, 1861. The defendant has pleaded in bar to the action "not indebted" and "limitations," and by an agreement in the cause, any defence may be given in evidence which will be admissible under any forms of pleading, and all errors of pleading are waived. It is also admitted that, after the execution of the policy, the war between the United States and the States known as the Confederate States broke out, and during its pendency the period covered by the policy transpired, without loss accruing under it. Under the plea of "not indebted," the defendant contends that upon the breaking out of hostilities the policy was dissolved as a contract between parties whose respective

§ 42. In *Kershaw v. Kelsey*,¹ Mr. Justice Gray, after a learned and exhaustive review of the authorities upon the

governments were at war with each other, and under the second plea he insists that, as more than three years have elapsed since the maturity of the note, recovery upon it is barred by the statute.

Inasmuch as, since the institution of the suit, the question of limitations in such cases has been disposed of by the promulgation of an authoritative decision of the Supreme Court of the United States, to the effect that in computing the time of the running of the statute, the period during which the existence of the war suspended the remedy must be deducted, I am relieved from any further examination of that question, and must determine against the plea. *Hanger v. Abbott*, 6 Wall. 532. The defence first mentioned is, therefore, the only one which needs now to be considered. It seems to me that the solution of this question depends upon the application of a few propositions which are now definitely adjudged and received as settled law.

First. The existence of war does not now, as was formerly held, annul contracts made between citizens of the respective contending nations, made anterior to its breaking out, but only suspends the remedy upon them during the pendency of the war, unless they be executory in their character, and require for their execution that commercial intercourse shall be maintained between the contracting parties, or unless they be of a character calculated to hinder, or to repair by indemnity, the acts of war which it is the effort of the power, whose courts are invoked to sustain them, to commit; in which event the policy of nations demands, that they shall be held to be dissolved by the declaration of war. Of this last class are contracts of insurance, with a clause covering capture by the assured's own government, because that government will not allow indemnity to be secured for the injuries it is itself endeavoring to perpetrate, but such contracts are dissolved only to the extent of the obnoxious clauses, remaining good as to the rest. *Hanger v. Abbott*, 6 Wall. 536; *The William Bagely*, 5 Wall. 407; *Furtado v. Rodgers*, 3 Bos. & Pul. 201.

Secondly. The right to sue upon contracts thus affected, with suspension of remedy, revives upon the restoration of peace, and thereafter exists as amply as if the war had never arisen. Applying these principles to the premium note, which is the subject of this suit, we find it is liable to none of the objections which would dissolve its obligations as a contract, but must be associated with that class, the remedy upon which was only suspended during the pendency of the war, and is by the return of peace now revived, unless it can be successfully maintained that the policy for which it constituted the consideration was itself dissolved by the breaking out of hostilities. We must try the policy, then, by the same rules to which we have subjected the note. It was made before the war broke out, and was then a valid contract. It is not executory in its character, in the sense in which that word is to be understood in connection with this subject, and does not necessitate any intercourse between the contracting parties during the continuance of the war. It is not chargeable with being injurious to the government of the United States, because the courts will not construe the

¹ 100 Mass. 561.

effect of war upon contracts between belligerents, comes to the conclusion that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries, and that this includes any act of voluntary submission to the enemy, or receiving his protection, as well as any

general clause against capture to include a capture by the cruisers of that government (*Brandon v. Curling*, 4 East, 417), and indemnity to the defendants against capture by the Confederate cruisers would be rather in aid of, than in opposition to, the government of the United States. We find, then, that this contract of insurance, being free from any of the conditions which would cause it to be dissolved by the war, stands only in the category of those the remedy upon which, if any loss within its risks had happened, would have been suspended till revived by the return of peace.

It is a mistake, founded on loose statements of text-writers, to suppose that policies of insurance, effected before the war, between assured and underwriters, respectively, belonging to opposite belligerent powers, are, for all purposes, dissolved by the breaking out of the war. For indemnity against all sea perils, barratry, fire, and the other usual sea risks, except capture by the enemy of the nation, in whose courts such loss is sought to be recovered, they are perfectly valid, and may be recovered on for any such loss as soon as the right of action is restored by the return of peace.

Upon careful scrutiny of the decided cases, it will be found that in all of them in which recovery on such policies was desired, the claim was founded on capture by the enemy, and not on losses by any other peril. In the case of *Furtado v. Rodgers*, in 3 Bos. & Pul., chiefly relied on by text-writers to sustain the *dictum* that a policy, though executed before a war, is avoided; or, as it is said, is dissolved by the breaking of the war, is one where the loss sought to be recovered was a loss by capture by the forces of Great Britain, in whose courts the suit was brought.

The court held that it was not competent for a British subject to insure against a capture by his own government, and that a claim for a loss founded upon such a capture could not be recovered, but, in concluding the opinion of the court, Lord Alvanley says: "The plaintiff is not entitled to a return of premium, because the contract was legal at the time the risk commenced, and was a good insurance against all other losses but that arising from capture by the forces of Great Britain." If, then, the policy in the case at bar was good for any purpose, it was a good consideration in the beginning for the making of the premium note now sued on, and as the defendant had indemnity under it during the whole year, against all perils but capture by the forces of the United States, it cannot be said that there has been such a failure of consideration as will release him from the obligation to pay the note. I will therefore enter a judgment in favor of the plaintiff, for the amount of the note, with interest from its maturity to this date, deducting from that time the period during which the war was pending.

See also, to the same point, *Semmes v. City Fire Ins. Co. of Hartford*, 13 Wall. (U. S.) 159.

act or contract which tends to increase his resources, and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. Beyond the principle of these cases the prohibition has not been carried by judicial decision, and the more sweeping statements of the text-books rest upon the authority of *dicta* which are shown to be unsupported by the facts under consideration. And the learned judge continues: "At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint, in consequence of war between their governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war. The trading or transmission of property or money, which is prohibited by international law, is from, or to, one of the countries at war. An alien enemy, residing in this country, may contract and sue like a citizen. When a creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there, authorized to receive the amount of the debt throughout the war, payment there to such creditor or his agent can in no respect be construed into a violation of the duties imposed by a state of war upon the debtor; it is not made to an enemy in contemplation of international or municipal law; and it is no objection that the agent may possibly remit the money to his principal in the enemy's country; if he should do so the offence would be imputable to him, and not to the person paying him the money," — a lucid, and, we apprehend, an accurate exposition of the present state and tendency of the law upon this interesting point.

CHAPTER III.

OF THE CONSUMMATION OF THE CONTRACT.

§ 43. *Contract, when completed.* — From the extent and peculiar character of the operations of insurance companies and their agencies questions frequently arise, sometimes of great difficulty, as to the fact whether any contract has been made. Negotiations have been had, but have they resulted in a contract? This, of course, depends upon the question, whether the respective parties have come to an understanding upon all the elements of the contract, — the parties thereto; the subject-matter of insurance; the amount for which it is to be insured; the limits of the risk, including its duration in point of time, and extent in point of hazards assumed; the rate of premium; and, generally, upon all the circumstances which are peculiar to the contract and distinguish it from every other, so that nothing remains to be done but to fill up the policy and deliver it on the one hand, and pay the premium on the other. If, upon all these points, an agreement has been arrived at, and no stipulation is made that the delivery of the policy shall be the test of the consummation of the contract, and no law makes such delivery a condition precedent to its validity from that time, unless another time is fixed, the contract is complete, and binds the parties. The policy, as we have seen,¹ is not essential to its validity. It is but the form and embodiment, the expression and evidence, of what has already been agreed upon, adding nothing thereto and detracting nothing therefrom. And whether issued immediately upon the arrival at a mutual understanding, or subsequently, before the loss or after the loss, with or without knowledge, or not issued at all, the obligations of the parties are not affected. If the insurers refuse under such circumstances to issue a policy because a

¹ *Ante*, c. 2.

loss has intervened, or any other change has taken place which would not be a defence under the policy if that had been delivered, they will not be allowed by the law to take advantage of the fact that no policy has been issued, but in divers modes, stated in another place, will be compelled to recognize their obligations just as fully as if a policy had been issued.

§ 44. The agreement for insurance is complete when the terms thereof have been agreed upon between the parties, and the reciprocal rights and obligations of the insurer and the insured date from that moment, without reference to the execution and delivery of the policy, unless these two elements are embraced within the terms agreed upon. The contract imports an obligation on the part of the insurer to execute and deliver a policy to the insured. And on the completion of the negotiations, the policy, executed in accordance therewith, and dated on the day of the completion, though not actually delivered till afterwards, or at all, will take effect from its date, unless some other terms are expressly agreed upon.¹

§ 45. Distinction between Policy and Agreement to insure. — There is at least a technical distinction between a contract of insurance or policy and an agreement to insure. The latter may, and in point of fact does, exist prior to the drawing up and the delivery of the policy, and contemplates the delivery of the policy as the consummation of the agreement. And upon this distinction much important and interesting litigation has arisen. It being settled that insurers may now become liable for a loss although they may not have issued a policy, the question often arises when that liability is fixed ; in other words, when the negotiations have reached such a point that if the insurers refuse to issue a policy the courts will interpose to compel them to issue one, or to indemnify the insured to the same extent and in like manner as if they had issued a policy. This interposition will usually be successfully invoked when the negotiations have reached such a point that nothing

¹ *Lightbody v. North Am. Ins. Co.*, 23 Wend. (N. Y.) 18; *Hallock v. Commercial Ins. Co.*, 2 Dutch. (N. J.) 268; s. c. affirmed, 3 Dutch. (N. J.) 645; *Flint v. Ohio Ins. Co.*, 8 Ohio, 501; *Xenos v. Markham*, 2 Law Repts. (H. L.) 296; *American Home Ins. Co. v. Patterson*, 28 Ind. 17.

remains to be done by either party but to execute what has been agreed upon. Thus, in *Kohne v. Insurance Company of North America*,¹ the plaintiff's agent applied for insurance, and agreed upon all the terms, but left the office before the policy was filled out. This, however, was filled out within a few hours, and notice thereof given by the company, accompanied, however, by notice that the company had received information that a loss had happened. On calling for the policy and tendering the premium, the agent was refused, on the ground that a loss had happened before the delivery, and the contract was not complete. But the court held otherwise, as every thing had been agreed on, and nothing remained to be done but to carry out the terms already agreed on, and the plaintiff had a verdict.²

Completion after Loss. — As another practical illustration of the doctrine that where the parties have come to an agreement upon all the terms, and nothing remains but to execute what has already been agreed upon, a policy must issue, may be stated the case of *Mead v. Davidson*,³ where it appeared, in an action on a policy on a ship, "lost or not lost," that the risk had been accepted and the premium paid before loss; but before the delivery of the policy, — what was not known to either party at the time the agreement was made and the premium paid, — it came to the knowledge of both parties that a loss had happened, notwithstanding which the company, recognizing their obligation under the agreement, executed and delivered a policy in accordance therewith. And the question was whether such a policy, so executed after knowledge on the part of both parties of the loss, could be upheld. Upon this point the court had no doubt. The conduct of the company might be extraordinary, but it was only in execution of what they had agreed to do upon sufficient consideration.

§ 46. **Negotiation by Correspondence.** — When the negotiations

¹ 1 Wash. (U. S. C. C.) 93.

² This case was trover for the policy. The amount of damages is not stated in the case as reported, but it was undoubtedly the same as if the plaintiff had sued and recovered on the policy, had it been delivered. See also *Goodall v. New England Mut. Fire Ins. Co.*, 5 Fost. (N. H.) 169.

³ 4 Ad. & Ell. 303, in the K. B.

are carried on by correspondence through the mail, the precise point at which the contract becomes binding on both parties has been the subject of diverse opinions held by equally distinguished tribunals. On the one hand, it has been held that when a party applies for insurance by letter, and receives a reply stating the terms upon which the insurance can be had, to which the applicant replies accepting the terms, the contract does not become binding until the letter of acceptance is received, or, at all events, the fact of acceptance has in some way come to the knowledge of the insurers. This was the view taken by the Supreme Court of Massachusetts, so that a letter written by the insurers retracting their offer, and mailed before they had received the letter accepting their offer, had the effect to prevent an agreement.¹

On the other hand, at about the same time the Court of King's Bench in *Adams v. Lindsell*,² where the defendants offered, by letter, to sell the plaintiff a lot of wool upon certain terms, requesting an answer by due course of mail, to which letter the plaintiff, as soon as he received it, replied, accepting the offer, held that the contract was complete when the plaintiff mailed the letter accepting the offer, as otherwise no contract could ever be completed by the post; for if the defendants were not bound by their offer, when accepted by the plaintiffs, until the answer was received, then the plaintiffs ought not to be bound till after they had received notice that the defendants had received their answer and assented to it, and so it might go on *ad infinitum*. The defendants must be considered, in law, as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and

¹ *McCulloch v. Eagle Ins. Co.*, 1 Pick. (Mass.) 278. The court cited *Cooke v. Oxley*, 3 D. & E. 653, which was a case where the defendant offered to sell tobacco to the plaintiff upon certain terms, and at the plaintiff's request gave him till a certain time to accept or reject, before the arrival of which time notice of acceptance was given, and the court held that there was no contract; and *Payne v. Cave*, 3 D. & E. 148, which was a case where the court held that a bidder at an auction had a right to withdraw his bid at any time before the hammer was down; that is, at any time before the acceptance of the bid. The doctrine of this last case is fully sustained by Pothier, *Traité du Contrat de Vente*, p. 1, § 2, art. 3, no. 32.

² 1 Barn. & Ald. 681.

then the contract is completed by the acceptance of it by the latter.¹

§ 47. In this irreconcilable conflict of opinion the Court of Errors of New York,² the Supreme Court of Pennsylvania,³ and the Supreme Court of the United States,⁴ have been called on to adjudicate upon substantially the same question. In the first of these cases, the letter of acceptance, after much correspondence, was mailed before the death of the party to whom it was addressed, but did not arrive at its destination till after the death, and the court approved and adopted the doctrine of the English case, as well upon the reason of the thing, as upon the apparent approval of the same by the Court of Common Pleas, in *Routledge v. Grant*.⁵ The case in Pennsylvania was a little more complex in its facts, which were substantially as follows: The plaintiff applied to the agent of an insurance company by written application for insurance upon an academy building, agreed upon the terms, and paid the premium, and received a certificate from the agent that the property would be insured from the date of the application, if the company approved. On transmitting the papers to the company, without approving the application they wrote to the agent that the plaintiff must make certain changes; and when the company were duly certified that these requisites were complied with a policy would be sent. These requisites were complied with, and the agent duly notified thereof, and requested to call and examine for himself, which however he, from press of business, neglected to do until the building insured was burned. On a refusal on the part of the company to pay the loss on the ground that no contract had been perfected, the court, adopting the principle of the English case, held that the con-

¹ The cases of *Payne v. Cave* and *Cooke v. Oxley*, *ubi supra*, were cited in this case by the defendants' counsel, but the court did not regard them as authoritative. During the delay which intervened between the forwarding the offer, which by misdirection did not reach the plaintiff in the usual season, the defendants had sold the wool to another purchaser. This decision has the approval of Chancellor Kent, Com. vol. ii. p. 477, note *a*.

² *Mactier v. Frith*, 6 Wend. (N. Y.) 103.

³ *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Barr (Penn.), 339.

⁴ *Taylor v. Merchants' Fire Ins. Co.*, 9 How. (U. S.) 390.

⁵ 4 Bingham, 653.

tract was completed by notice given to the agent of his compliance with the requisitions of the company. He had performed that in consideration of which a policy had been promised, and he was therefore entitled to his policy. In the case in the Supreme Court of the United States, the facts were that the plaintiff applied for insurance to the company's agent, who, after communication with his principal, wrote the plaintiff stating the terms, and added that if he wished to insure he could send his check for the premium, "and the business is concluded." This letter was delayed by misdirection; but as soon as received and before any loss, the plaintiff replied, accepting the terms, and inclosing his check. The letter of acceptance, however, did not reach the agent till the property insured had been destroyed; and in this case also it was claimed on the part of the insurers that no contract had been completed; and the case having been elaborately argued on both sides by very able counsel, the court said, in giving their decision : —

"Several objections have been taken to the right of the complainant to recover, which it will be necessary to notice; but the principal one is, that the contract of insurance was not complete at the time the loss happened, and, therefore, that the risk proposed to be assumed had never attached.

"Two positions have been taken by the counsel for the company for the purpose of establishing this ground of defence.

"1. The want of notice to the agent of the company of the acceptance of the terms of the insurance; and,

"2. The non-payment of the premium.

"The first position assumes that, where the company have made an offer through the mail to insure upon certain terms, the agreement is not consummated by the mere acceptance of the offer by the party to whom it is addressed; that the contract is still open and incomplete until the notice of acceptance is received; and that the company are at liberty to withdraw the offer at any time before the arrival of the notice, and this even without communicating notice of the withdrawal to the applicant; in other words, that the assent of the company, express or implied, after the acceptance of the terms proposed by the insured, is essential to a consummation of the contract.

“The effect of this construction is, to leave the property of the insured uncovered until his acceptance of the offer has reached the company, and has received their assent; for, if the contract is incomplete until notice of the acceptance, till then the company may retract the offer, as neither party is bound until the negotiation has resulted in a complete bargain between the parties.

“In our apprehension, this view of the transaction is not in accordance with the usages and practice of these companies in taking risks; nor with the understanding of merchants and other business men dealing with them; nor with the principles of law, settled in analogous cases, governing contracts entered into by correspondence between parties residing at a distance. On the contrary, we are of opinion that an offer under the circumstances stated, prescribing the terms of insurance, is intended, and is to be deemed a valid undertaking on the part of the company, that they will be bound, according to the terms tendered, if an answer is transmitted in due course of mail accepting them; and that it cannot be withdrawn, unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted.

“This view of the effect of the correspondence seems to us to be but carrying out the intent of the parties, as plainly manifested by their acts and declarations.

“On the acceptance of the terms proposed, transmitted by due course of mail to the company, the minds of both parties have met on the subject, in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete. The party to whom the proposal is addressed has a right to regard it as intended as a continuing offer until it shall have reached him, and shall be in due time accepted or rejected.

“Such is the plain import of the offer. And besides, upon any other view, the proposal amounts to nothing, as the acceptance would be but the adoption of the terms tendered, to be, in turn, proposed by the applicant to the company for their approval or rejection. For, if the contract is still open until

the company is advised of an acceptance, it follows, of course, that the acceptance may be repudiated at any time before the notice is received. Nothing is effectually accomplished by an act of acceptance.

“It is apparent, therefore, that such an interpretation of the acts of the parties would defeat the object which both had in view in entering upon the correspondence.

“The fallacy of the argument, in our judgment, consists in the assumption, that the contract cannot be consummated without a knowledge on the part of the company that the offer has been accepted. This is the point of the objection. But a little reflection will show, that, in all cases of contracts entered into between parties at a distance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present.

“The position may be illustrated by the case before us. If the contract became complete, as we think it did, on the acceptance of the offer by the applicant, on the 21st December, 1844, the company, of course, could have no knowledge of it until the letter of acceptance reached the agent, on the 31st of the month; and, on the other hand, upon the hypothesis it was not complete until notice of the acceptance, and then became so, the applicant could have no knowledge of it at the time it took effect. In either aspect, and, indeed, in any aspect in which the case can be presented, one of the parties must be unadvised of the time when the contract takes effect, as its consummation must depend upon the act of one of them in the absence of the other.

“The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor, for the same reason, can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence; the acceptance must succeed the offer after the lapse of some interval of time; and, if the process is to be carried farther in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from the one party to the other.

“It is obviously impossible, therefore, under the circumstances stated, ever to perfect a contract by correspondence, if a knowledge of both parties at the moment they became bound is an essential element in making out the obligation. And as it must take effect, if effect is given at all to an endeavor to enter into a contract by correspondence, in the absence of the knowledge of one of the parties at the time of its consummation, it seems to us more consistent with the acts and declarations of the parties to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated, instead of postponing its completion till notice of such acceptance has been received and assented to by the company.

“For why make the offer, unless intended that an assent to its terms should bind them? And why require any further assent on their part, after an unconditional acceptance by the party to whom it is addressed?

“We have said that this view is in accordance with the usages and practice of these companies, as well as with the general principles of law governing contracts entered into by absent parties.

“In the instructions of this company to their agent at Fredericksburg, he is advised to transmit all applications for insurance to the office for consideration; and that, upon the receipt of an answer, if the applicant accepts the terms, the contract is considered complete without waiting to communicate the acceptance to the company; and the policy to be thereafter issued is to bear date from the time of the acceptance.

“The company desire no further communication on the subject, after they have settled upon the terms of the risk, and sent them for the inspection of the applicant, in order to the consummation of the bargain. The communication of the acceptance by the agent afterwards is to enable them to make out the policy. The contract is regarded as complete on the acceptance of the terms.

“This appears, also, to have been the understanding of the agent; for, on communicating to the insured the terms received

from the company, he observes, 'Should you desire to effect the above insurance, send me your check payable to my order for fifty-seven dollars, and the business is concluded;' obviously enough importing that no other step would be necessary to give effect to the insurance of the property upon the terms stated.

"The cases of *Adams v. Lindsell*¹ and *Mactier's Administrators v. Frith*² are authorities to show that the above view is in conformity with the general principles of law governing the formation of all contracts entered into between parties residing at a distance by means of correspondence.

"The unqualified acceptance by the one of the terms proposed by the other, transmitted by due course of mail, is regarded as closing the bargain, from the time of the transmission of the acceptance.

"This is also the effect of the case of *Eliason v. Henshaw*,³ in this court, though the point was not necessarily involved in the decision of the case. The acceptance there had not been according to the terms of the bargain proposed, for which reason the plaintiff failed.

"2. The next position against the claim is the non-payment of the premium.

"One of the conditions annexed to the policies of the company is, that no insurance will be considered as made or binding until the premium be actually paid; and one of the instructions to the agent was that no credit should be given for premiums under any circumstances.

"But the answer to this objection is that the premium, in judgment of law, was actually paid at the time the contract became complete. The mode of payment had not been prescribed by the company, whether in specie, bills of a particular bank, or otherwise; the agent, therefore, was at liberty to exercise a discretion in the matter, and prescribe the mode of payment; and, accordingly, we find him directing in this case, that it may be paid by a check payable to his order for the amount. It is admitted that the insured had funds in the bank upon which it was drawn, at all times from the date of

¹ 1 Barn. & Ald. 681.

² 6 Wend. 104.

³ 4 Wheat. 228.

the check till it was received by the agent, sufficient to meet it; and that it would have been paid on presentment.

"It is not doubted that, if the check for the premium had been received by the agent from the hands of the insured, it would have been sufficient; and in the view we have taken of the case, the transmission of it by mail, according to the directions given, amounts, in judgment of law, to the same thing. Doubtless, if the check had been lost or destroyed in the transmission, the insured would have been bound to make it good; but the agent, in this respect, trusted to his responsibility, having full confidence in his ability and good faith in the transaction."¹

§ 48. And the doctrine of this latter case, so well expounded and maintained in the opinion cited at so much length, must now be considered as the one which is supported by the great preponderance of authority, and as recommended, if not by the better reason, at least by its greater practicability, a consideration which seems to have had controlling importance in leading to its adoption.²

And, indeed, it may be inferred from what fell from the court in a later case,³ that, even in Massachusetts, it is by no means certain that the case of *McCulloch v. Eagle Insurance Company* would be followed except in a case exactly coinciding with it in its facts, the court there observing that it may well be conceded that when notice of acceptance is to be given by mail a notice actually put into the mail, especially if forwarded, and beyond the control or revocation of the party making it, may be good notice.

§ 49. *Acceptance.*—An offer of insurance by mail is, therefore, a continuing offer, and becomes binding upon acceptance before notice of withdrawal in due course of mail; and the unqualified acceptance by one party of the terms proposed by the other, transmitted by due course of mail, is to be regarded as closing the bargain from the time of the transmission of the acceptance. The concurrence of knowledge in point of time

¹ *Taylor v. Merch. Fire Ins. Co.*, 4 How. (U. S.) 390.

² *Palm v. Medina Ins. Co.*, 20 Ohio, 529, and cases cited, *post*, § 49.

³ *Thayer v. Middlesex Mut. Fire Ins. Co.*, 10 Pick. (Mass.) 332.

with the act of completion is wholly impracticable in contracts by correspondence, since the consummation must depend upon the act of one party in the absence of the other.¹

But the acceptance must be within reasonable time. And where a reply would naturally be expected by the next return mail after the receipt of the offer, a delay covering the departure of one or more mails would seem to be unreasonable, and the party making the offer would have a right to presume that the offer was rejected.²

§ 50. **No Contract unless all the Terms are agreed upon.** — But it is to be carefully noted that, unless the parties have come to an agreement upon all the terms of the contract, so that so far as the terms are concerned nothing remains open, and nothing remains to be done but to execute what has been agreed upon, the contract is still incomplete, and of no binding force upon either party. An offer by one party imposes no obligation upon another until accepted by him according to the terms in which the offer is made. The offer must be accepted as it is. If not, and any qualification of or departure from its terms is made, it must be referred back to the party making the original offer for his acceptance of the qualification before he can be bound.³ Hence, when the defendant offered to purchase flour at a certain price, and required the answer to be sent to a certain place, an answer accepting the offer, but addressed to the defendant at another place than that by him designated, was held not to be an acceptance which would bind the defendant, although the defendant received it. The terms of the offer had not been complied with.⁴

§ 51. And to the same effect is the following case: On the 18th day of the month the plaintiff wrote to the defendant that he would sell him oil-cake at a certain price. On the 19th the

¹ *Western v. Genesee Mut. Ins. Co.*, 2 Kernan (N. Y.), 258; *Hallock v. Com. Ins. Co.*, 2 Dutch. (N. J.) 268; s. c. affirmed, 3 Dutch. (N. J.) 645; *Duncan v. Topham*, 8 C. B. 225. In this case the letter of acceptance never reached its destination.

² *Thayer v. Middlesex Mut. Fire Ins. Co.*, 10 Pick. (Mass.) 326. See also *Insurance Co. v. Johnson*, 23 Penn. St. 72. And see *post*, § 53.

³ *Chase v. Hamilton Mut. Ins. Co.*, 22 Barb. (N. Y.) 527.

⁴ *Eleason v. Henshaw*, 4 Wheat. (U. S.) 228.

defendant replied that he would take a certain amount, "but it must be put on board directly." On the 22d of the same month the plaintiff replied, "I shall ship to-morrow." This last letter never reached its destination. Upon the facts, the court held that "directly" meant, in point of time, something less than "within a reasonable time," and that an acceptance which might have been made on the 20th, made and posted on the 22d, coupled with a day's further delay in shipping, was not an acceptance according to the terms of the defendant's offer.¹ So where a proposal was made for insurance, in which the rate of premium was not fixed, and the company transmitted to their agent a letter accepting the proposal, and stating that a policy would be issued on the payment of a certain premium; which letter, however, owing to an unfavorable change in the health of the applicant, the agent did not make known to him; it was held that the terms of the contract were never agreed upon, the rate of premium not having been stated and accepted.²

So where the insured agrees to take the policy at any rate of premium fixed by the company, and the agent forwards the application and fixes the rate of premium which he thinks the principal should accept; but the principal, opposing the application, fixes a larger rate, with the right of the applicant to decline, and forwards the policy to the agent, which, through his neglect, is lost, and not brought to the notice of the applicant till after a loss, the contract was held incomplete, as the parties had come to no understanding as to the rate of premium.³

§ 52. So where an action was brought for the recovery of a premium note given by the defendant, on a policy executed by the company, and the question was, whether the policy corresponded with the previous agreement, so that the defendant was bound to accept it; it appeared that Carrington wrote to the company to inquire upon what terms they would make an

¹ *Duncan v. Topham*, 8 C. B. 225.

² *Rose v. Med. Ins. & Gen. Life Ins. Soc.*, 11 Court of Session Cases (Scotch), 2d series, 345; s. c. 20 Scotch Jur. 534. See also *Neville v. Mer. & Man. Ins. Co.*, 19 Ohio, 452. And see *post*, §§ 56, 57.

³ *Wallingford v. Home Mut. Fire & Mar. Ins. Co.*, 30 Mo. 46.

insurance "on twenty-six horses and twenty oxen, on board the brig Gleaner, from Saybrook to the West Indies," saying nothing as to the valuation of the property, or the sum he desired to be insured. The company replied in these words: "The office will take the risk at fifteen per cent, or at ten per cent with a warranty that the property was safe on the 7th of December last, but no partial loss is to be paid under ten per cent." By the mail of the next day Carrington replied, "We accept your terms with a policy filled, on twenty-six horses valued at \$2,200, and on twenty oxen, valued at \$800," and in this letter inclosed the premium note. The company, on the following day, forwarded by mail a policy "for \$3,000 on stock, on the deck of the brig Gleaner," with this note in the margin, "forty-six head of horses and oxen, valued at \$3,000." This policy the defendant refused to accept, and immediately returned it to the company. The ground of this refusal was, that the horses and oxen were included in one *gross valuation*, instead of being *separately* valued, according to the terms in which he had accepted the offer. In delivering the judgment of the court, and commenting on the defendant's second letter, Chief Justice Hosmer said, "This was a *new* proposal, which Carrington might presume the company would accept, but could not know it. The office had assumed no such obligation, as the office had not agreed to underwrite a valued policy; neither had the defendant agreed to receive an open policy. The minds of the parties had not met. It would be plainly an unjustifiable stress upon the first words of the letter 'we accept,' to consider this expression as concluding the contract. The underwriters, by the valued policy which they transmitted, recognized the new proposal in part, and if they had attended to their import, the same words would have convinced them that a separate valuation of the horses and oxen was proposed. The policy transmitted was not conformable to the proposition. The parties never did agree."¹

§ 53. **Acceptance.** — Where the proposition is by letter, the usual mode of acceptance is by sending a letter announcing the acceptance. When it is made by a messenger, a determi-

¹ Ocean Ins. Co. v. Carrington, 3 Conn. 357.

nation to accept returned through him, or by another, would seem to be all the law requires. But there are other modes of acceptance equally conclusive upon the parties. Any thing that amounts to a manifestation of a formal determination to accept, communicated, or put in the proper way to be communicated to the party making the offer, would doubtless complete the contract. An acceptance is the distinct act of one party to the contract, as much as the offer is of the other. What will constitute an acceptance depends in a great measure upon the circumstances of the case. A mere mental assent, not indicated by any outward expression, has nowhere been held to be sufficient. Nor is mere silence or neglect to respond sufficient, even when the applicant, having done all that is required of him, is to receive his policy if the directors approve, otherwise the premium paid is to be refunded. And this is so although neither the money is refunded nor a reply made within six months.¹

And a letter of acceptance written, but still in the possession of the writer, or under his control, would not probably be regarded as any thing more than a mere mental assent. The unpublished or undelivered letter would perhaps be considered as but little better as matter of evidence than the unspoken intent. What seems to be necessary is, that the acceptance should be manifested by some act which is open to the observation of others, and of such a character as naturally to give rise to the presumption of acceptance, in contradistinction to an equivocal act, which might, or might not, be connected with an acceptance, but would not naturally suggest it. The observation of the late Mr. Chief Justice Gibson in *Hamilton v. Lycoming Mutual Insurance Company*,² that an actual concurrence of assent at any particular moment is the ruling circumstance, must be taken with the qualification that, the assent, though not brought to the knowledge of the other party, must have taken some outward form of expression. Nothing further than this was called for by the case. The

¹ *New York Union Mut. Ins. Co. v. Johnson*, 23 Penn. St. 92; *Myers v. Keystone Mut. Life Ins. Co.*, 27 Penn. St. 268.

² 9 Barr (Penn.), 339.

meeting of two minds, the *aggregatio mentium* necessary to the constitution of every contract, must take place *eo instanti* with the doing of any overt act intended to signify to the other party the acceptance of the proposition, without regard to when that act comes to the knowledge of the other party. The overt act may vary with the form and nature of the contract. It may be by the fall of the hammer, by words spoken, by letter, by telegraph, by remitting the article sent for, by mutual signing, or by delivery of papers; and the delivery may be by any act intended to signify that the instrument shall have a present vitality. Whatever the form, the act done is the irrevocable evidence of the *aggregatio mentium*; and at that instant the bargain is struck. The acceptor can no more overtake and countermand by telegraph his letter mailed, than he can his words of acceptance after they have issued from his lips on their way to the hearer.¹

§ 54. **Agreement with Agent subject to Approval of Principal.**—If an agent agrees with the applicant upon the terms of insurance, subject to the approval of his principal, and his principal returns a policy containing a modification of the terms, which the agent forwards to the applicant, with a request that he will return it if he does not comply with the terms, and the applicant neither returns the policy nor complies with the modified terms,—the payment of additional cash premiums,—the delivery is only conditional, and the contract is not complete till the compliance with the new terms.² So where all the terms are agreed upon, and the assured is told that he may regard himself as insured, but pending the issue of the policy the assured notifies the insurers that he desires a change, the particulars of which he does not state, and neglects to attend to the modification, though requested, and notified by the insurers that unless he call and make known the desired change they will not be held responsible, the contract is still incomplete.³ And the plaintiff will be in no better position if he inquire for his policy, and being told by the agent

¹ Hallock v. Com. Ins. Co., 2 Dutch. (N. J.) 268; s. c. 3 Dutch. (N. J.) 645.

² Myers v. Keystone Mut. Life Ins. Co., 27 Penn. St. 268.

³ Sandford v. Trust. Fire Ins. Co., 11 Paige (N. Y. Ch.), 547.

that he could not tell whether he had received it or not, but thought he delivered it to the plaintiff, neglects further inquiry. He must accept the contract as modified, or there is no contract, and the negligence of the agent will not excuse his non-acceptance.¹

§ 55. **Agreement with Agent, Payment of Premium.**— And although the policy be made out and forwarded to the agent to be delivered to the applicant on payment of the premium, the applicant, by an understanding with the agent, having still the option to take or reject the policy, as it still remains for the applicant to declare his option and pay the premium, he will not be entitled to a delivery thereof until such a payment. And if on being called upon by the agent and tendered the policy on payment of the premium, he refers him to a third person, who, he says, will pay the premium, and the agent agrees to call upon that person, this is not the equivalent of payment. Perhaps it would be otherwise if the third person had agreed to pay the premium.² Such a case is to be distinguished from those where the party claiming the policy has done every thing which is required of him. There the policy is held merely as a deposit, and for delivery; while here it is held for payment of the premium.

§ 56. **Contract prima facie Incomplete if no Delivery and no Payment of Premium.**— If there has been no payment of the premium, and no delivery in fact of the policy, the contract is, *prima facie*, incomplete, and he who claims under it must show that it was the intention of the parties that it should be operative notwithstanding these facts.³ The presumption of law is, that the delivery of the policy and the payment of the premium are dependent upon each other. But this presumption may be rebutted by showing a waiver of the payment, or such other facts as go to show the intention and understanding of both parties that the policy shall be valid as if delivered, notwithstanding the non-payment of the premium. And an

¹ Wallingford v. Home Mut. Fire Ins. Co., 30 Mo. 46.

² Hoyt v. Mutual Benefit Life Ins. Co., 98 Mass. 539.

³ Faunce v. State Mut. Life Assurance Co., 101 Mass. 279; Heiman v. Phoenix Mut. Life Ins. Co., Supreme Court of Minnesota, Jan. 1872; 1 Insurance Law Journal, 415.

actual delivery, obtained by misrepresentation, is no delivery to give effect to the contract. The mere manual possession of the policy is of little consequence, whether it be in the hands of the insurers or the insured. Its possession by the insured makes a *prima facie* case for him, subject to be met by proof that it was fraudulently obtained, and so never delivered by the consent of the insurers ; while its possession by the insurers makes a *prima facie* case for them, subject to be met by proof that, though not transferred, it was intended by the parties to be a valid contract, without further action by either, and so in legal contemplation there was a delivery.

In *Markey v. Mutual Benefit Life Insurance Company*,¹ there had been an actual manual possession of the policy by the assured, but under such circumstances that in the opinion of the court it was for inspection only, according to the intention and understanding of both parties, it having been returned to the agent who, it was understood, would call upon a third party, referred to by the insured, to see if he would pay the premium. In *Collins v. Insurance Company of Philadelphia*,² the policy was sent to the agent for delivery, on payment of the premium, which however was neither tendered, though requested, before the death, nor was there any waiver of the payment. In *St. Louis Mutual Life Insurance Company v. Kennedy*,³ the applicant forwarded with his application one note due in one year from the date of the application, and one note, being for the amount of the cash premium, payable on the delivery of the policy. It was a mere memorandum of the cash premium, and it was understood by the parties that, while the payment of the premium in cash would make the insurance take effect from that date, the promise, by this note, to pay it when the policy should be delivered, would have the effect to keep the contract open until delivery on the one hand, and the payment of the premium on the other. And it was said that even if the note was presumptively to be taken as in place of the cash premium, parol testimony going to show that it was not so regarded by

¹ 103 Mass. 78.

² 7 Phila. Rep. 201.

³ 6 Bush (Ky.), 450.

the parties was admissible to rebut the presumption. In *Faunce v. State Mutual Life Insurance Company*,¹ the new policy was deliverable as a substitute for and upon surrender of a prior policy, which surrender was never made or tendered, but on the contrary enforced and paid by the company. In *Bidwell v. St. Louis Floating Dock and Insurance Company*,² the insured was to execute his note to the company with the indorser, which was never done.

§ 57. **Acceptance subject to Approval.**— But a company which has informed its agent that they will be liable for a loss after the payment of the premium to him, and pending its receipt by them, subject however to their right to reject the risk, if from the rate of premium, or otherwise, it be not satisfactory, will not be allowed arbitrarily to reject it and refuse a policy, or to reject it merely because a fire has intervened.³

So when an agent is merely authorized to receive and forward applications on which the company are to issue policies, if approved, as of the date of the application. And this rule was applied where the loss occurred before the company had received, or, in due course of mail, would regularly receive the application and premium forwarded by their agent, and therefore had no opportunity to disapprove; and where there was no agreement for intermediate insurance, except what is to be inferred from the rule that if approved the policy was to bear the date of the application. The contract was held to be consummated on the day when the premium was paid, and it was said that the reservation of the right of approval did not give to the insurers the arbitrary right to set aside any contract, however fair, made by their agent, but only in cases where the agent had been imposed upon, or where the contract made by the agent would operate as a fraud upon the right of the company.⁴

§ 58. It is to be observed, however, that the case last cited upon the point as to the time when the contract was consum-

¹ 101 Mass. 279.

² 40 Mo. 42.

³ *Perkins v. Washington Ins. Co.*, 4 Cowen (N. Y.), 645; *Ins. Co. v. Webster*, 6 Wall. (U. S.) 129.

⁴ *Palm v. Medina Ins. Co.*, 20 Ohio, 529.

mated, it being made subject to the approval of the company, though probably sound upon the other point of arbitrary disapproval, goes farther than other courts seem inclined to follow. Thus in a later case in Pennsylvania, the agent was authorized to receive and forward applications, the insurance to take effect on all approvable applications the day they were taken. The agent gave a receipt for the premium and forwarded the same with the application to the company "if not approved by directors, money to be refunded." It appeared however that no notice was taken of the application by the company, nor was the money refunded; and in point of fact the company denied that they ever received the application or the premium. Upon these facts it was held that there was no contract to insure, but simply a proposal forwarded by the agent; and delay under such circumstances to forward a policy or refund the money, even if the company received the application, was rather ground for inference that they rejected than accepted the proposal. A proposal not answered remains a proposal for a reasonable time, and then is regarded as withdrawn. It is only a delay or neglect that has a tendency to mislead, and which is incompatible with honesty, which can be alleged as a ground of liability; as where one knows that another is acting as his agent in a particular matter without or beyond his authority, and does not promptly disavow his acts.¹

§ 59. In a very recent English case, in the same general spirit, the facts were that the plaintiff, through an agent, insured in a certain office. The agent then left the service of this office, and became agent for another. The plaintiff, not knowing the fact, on application for further insurance, received from the agent a receipt for a certain sum of money deposited in part payment of premium and duty, in consideration of which the property was to be insured for one month, or until notice that the proposal was declined, pending the negotiations on behalf of the new company. Upon the plaintiff's observing this, he wrote to the agent that he knew nothing of the new company, and wished to be satisfied of its standing before giving them all the sums.

¹ *Ins. Co. v. Johnson*, 23 Penn. St. 72, Woodward, J., dissenting. And see also *Myers v. Keystone Mut. Life Ins. Co.*, 27 Penn. St. 268.

Before any policy was made out the fire happened. Amongst other grounds of defence was this, that when the plaintiff first received his receipt he supposed he was contracting with the first company, and therefore there was no agreement with the second. But the court said that when the receipt was given the contract was complete, there being no repudiation by the plaintiff, and that the defence set up on the other ground was contemptible and ridiculous.¹

So where a wife applies to an agent for a policy on the life of her husband, and pays fifty dollars, in accordance with the company's rules, which is to be applied to the first year's premium if the risk is taken, and a policy is made out and sent to the agent for delivery but not delivered, it was held that a tender of the balance of the first year's premium after the death of the insured gave a valid claim upon the company for the amount insured.²

§ 60. **What constitutes Delivery of Policy.**—To constitute a delivery of a policy it is not necessary that there should be an actual manual transfer from one party to the other. The agreement upon all the terms and the issue and transmission to the agent of a policy in accordance therewith, for delivery without conditions, is tantamount to a delivery to the insured.³ The delivery may be by any act intended to signify that the instrument shall have present vitality.⁴ A policy purporting to be "signed, sealed, and delivered," as required by the charter, is complete and binding as against the party executing it, though, in fact, it remain in his possession, unless some further particular act be required to be done by the other party to declare his adoption of it. No formal acceptance is necessary to complete the delivery. Whether there is a delivery or not is often a question of intention. There is a delivery if the intention of both parties is, that from

¹ Mackie v. European Ins. Co., 21 Law Times, N. S. 102.

² Cooper v. Pacific Mut. Life Ins. Co., 7th Nevada, 116; Fried v. Royal Ins. Co. of Liverpool, 47 Barb. (N. Y.) 127; s. c. Ct. of App. Dec. 1872.

³ See cases cited in the last section. Also, New Eng. Fire and Mar. Ins. Co. v. Robinson, 25 Ind. 537; Whitaker v. Farmers' Union Ins. Co., 29 Barb. (N. Y.) 312.

⁴ Hallock v. Com. Ins. Co., 2 Dutch. (N. J.) 268; s. c. 3 Dutch. (N. J.) 645.

and after a certain act the policy shall become operative.¹ And the principle here laid down has been applied in a recent case where application on the twenty-seventh of September was made for insurance, the first year's premium to be paid in advertising the insurers' agency. The application was approved, a policy duly executed, and, on the second day of October, mailed to the agent of the insurer who had forwarded the application. On the fourth of October the insured died. On the fifth day of October the policy came to the hands of the agent, and he immediately returned it to the insurers. The agency was advertised as agreed. Upon these facts it was held that the contract was complete when the policy was mailed to the agent; if not, which was not decided, at the date of the receipt. If the premium was not paid in full it was the fault of the company.² In *Lightbody v. North American Insurance Company*, the premium having been paid and a receipt taken, it was held that insurance related back to the date of the receipt, though the policy was not delivered till some three weeks after, and after the fire.³ If the terms of the policy transmitted for delivery be changed by an authorized agent upon further negotiation with the insured, the insurance will take effect from the change, and not from the date, of the policy.⁴

§ 61. *Obligations Reciprocal.* — The cases we have been considering have been cases where the insured was seeking to enforce his rights against the insurers. But the insurers may have occasion to enforce their rights against the insured, as was the case in *Massachusetts*. The defendant made written application for insurance to a mutual insurance company. The rate of premium was agreed upon by the parties and the policy was made out, and the defendant requested to take

¹ *Xenos v. Wickham*, Law Reports, 2 H. of L. 296, reversing same case in the Exchequer Chamber. "Delivery is either actual, *i.e.*, by doing something and saying nothing; or else verbal, *i.e.*, by saying something and doing nothing; or it may be by both; and either of these may make a good delivery and a perfect deed." *Sheppard, Touchstone*, 1, 57. See also *Doe v. Knight*, 5 B. & C. 692.

² *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96.

³ 23 Wend. (N. Y.) 18.

⁴ *Gloucester Man. Co. v. Howard Ins. Co.*, 5 Gray (Mass.), 497.

them and sign the premium note and pay the premium. He however refused, and the policies were never delivered. In an action brought to recover the amount of the premium and certain assessments, the court held that the plaintiff must fail, for the very obvious reason that no contract was ever completed between the parties. The proceedings on the part of the defendant were merely the initiatory steps to a contract. The plaintiffs, pursuant to the defendant's request, had prepared a policy which would take effect as a contract on being delivered and not before. By the plaintiffs' by-laws the policy was not to be delivered until the payment of the premium and the signature of the deposit note, neither of which had taken place. If a loss had occurred, under the circumstances the plaintiffs would not have been liable, because there was no delivery of the policy.¹ But if the case had taken the form of a bill in equity to enforce a proper performance of the contract, the payment of the premium and assessments, and the execution of the deposit note, upon the general doctrine which is so familiar and so well established, that, when all the terms of the contract are agreed on, and nothing remains to be done by either party but to execute, the court will compel execution, it is yet to be decided that such a bill would not be sustained. It would certainly seem that the rights and obligations of the parties are reciprocal, and if, as we shall hereafter see,² the defendant, in this case, upon tender of performance on his part, could have compelled the execution and delivery of a policy, it would seem to follow that the plaintiffs, on tender of performance on their part, could equally compel payment of the premium, and the execution and delivery of the deposit note.

§ 62. *Effect of the provisions of the Charter or Policy on Rights of Parties.* — The relation of the delivery of a policy by a mutual insurance company to the consummation of the contract was considered under the following interesting circumstances. The general and local agents of the defendants, together, called upon the plaintiff on the seventh of October,

¹ Real Estate Mut. Fire Ins. Co. v. Roessle, 1 Gray (Mass.), 336.

² See Index, Remedies.

and after negotiations with him applications were prepared by the general agent, upon request to be insured from that time, and signed by the plaintiff in a manner satisfactory to the general agent, who said the policies would be made out without delay. The local agent at the same time told the plaintiff that it made no difference to him whether the plaintiff paid the cash premium at that time, or when he should take the policies; and he did not then pay it. The plaintiff then asked the agents for a copy of the by-laws of the company, and was told that they had none with them, but he would be furnished with a copy on the policies. No rules or regulations of the company were made known to the plaintiff. It was also understood between the agents and the plaintiff that the policies should be made out at once, and left with M. and F., M. being the local agent and F. his partner, no time being fixed when the plaintiff should call for them. The policies were accordingly executed and left with F. before the loss. F. was afterwards told by the president of the company to put them in the safe and take care of them, but was afterwards directed by the company not to deliver them, and they were subsequently taken back by the company. On the 10th October the plaintiff tendered the premium to F., while the policies were yet in his keeping, but after he had been instructed not to deliver them, who declined to receive it for the company, but consented to hold it as a deposit till suit was brought, when it was paid into court. F. at the same time declined to deliver the policies. The policies provided that each person should pay upon the execution of his policy, and before its delivery, the premium thereon; that no insurance should take effect until the cash premium was paid; and that no insurance agent, or broker, forwarding applications, was authorized to bind the company in any case whatever. And it was held that, upon these facts, a jury might find a waiver of the right to receive the cash premiums before the delivery of the policies, and if they should find such waiver, the policies were effectual from the time when they were left with F. for delivery.¹

¹ *Bragdon v. Appleton Mut. Ins. Co.*, 42 Me. 259. Cutting, J., dissented, on the ground that mutual insurance companies cannot waive a compliance with

§ 63. On the other hand, there are numerous and most respectable authorities, that insurance companies whose charters and by-laws define the mode in which they may contract, and the time and circumstances under which their contracts shall become binding upon them, cannot be held otherwise than in conformity with such provisions.

In the case of *Belleville Mutual Insurance Company v. Van Winkle*,¹ it appeared that all the terms of the contract had been agreed upon, and that a policy was to be issued dated as of the day of the agreement, it being distinctly stated by the secretary of the company that the applicant was thenceforth insured, and that the policy should be made out and sent right away. The policy was executed upon the eighteenth day of April. On the twentieth day the secretary wrote to the applicant, requesting him to sign the enclosed premium note and forward by return mail. On the twenty-second day, and before the note could be returned, a fire occurred. The applicant then tendered his note and demanded his policy, which the company refused, and placed their refusal on the ground that no deposit note had been received at the time of the loss; whereas, it was provided by the charter of the company, that "every person who shall become a member by effecting insurance, shall, before he receives the policy, deposit his promissory note for such a sum of money as shall be determined by the directors," thus making the deposit note a condition precedent to the membership. And the court, upon bill in equity for relief, sustained this view, reversing the decree of the court below. The applicant, said the court, was bound to know the terms of the charter and by-laws, and it was his duty to see that the premium note was duly made and deposited, and if he chose to wait till it could be sent to him by the secretary and returned, it was at his own peril. The by-laws

the terms and conditions upon which they may by their charter contract, as to which it was the duty of the plaintiff to have informed himself, adopting the rule laid down in the cases cited in the following section. See also to the same point with the case above cited from the Maine reports, *Pino v. Merchants' Mut. Ins. Co.*, 19 La. Ann. 214; *New Eng. Fire and Mar. Ins. Co. v. Schettler*, 38 Ill. 167.

¹ 1 Beasley (N. J.), 333.

expressly forbade any person becoming a member until the premium note was deposited. No officer had any right to dispense with this condition, and no one had any right to rely upon his assurances that it could be dispensed with, or that the insurance should take effect before the deposit of the note.¹

§ 64. But though mutual insurance companies and others may be inhibited by the terms of their charter from issuing policies except upon certain conditions, it does not follow that they are inhibited from agreeing to issue a policy in conformity with those conditions.² This was what was done in the case cited in the text. And although the secretary may have transcended his power when he undertook to say that the insurance should take effect from and after the time of the conference, it was not beyond his right to promise that the policy should be sent right away. Had this been done the policy would have been delivered at the time of the loss as a valid and binding policy. It was because he did not forward the note to be signed "right away," as he had agreed to do, that the policy was not issued before the fire. The secretary had a right to make this promise on behalf of the company, and the applicant had a right to rely upon it; and, it seems, did rely upon it. He was lulled into security by it; and by the fault of the secretary, that is, the company, he was without his promised policy when the fire occurred. If the fire had not occurred, can it be doubted that on a tender of the deposit note in response to the secretary's note enclosing it for signature, and

¹ *Barrett v. Union Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 175; *Real Estate Mut. Fire Ins. Co. v. Roessle*, 1 Gray (Mass.), 336; *Montreal Ins. Co. v. McGilivray*, 9 Lower Canada, Q. B. 488; *Spitzer v. St. Marks Ins. Co.*, 6 Duer (N. Y. Superior Ct.), 6; *Mound City Mut. Fire Ins. Co. v. Curran*, 42 Mo. 374. See also *Flint v. Ohio Ins. Co.*, 8 Ohio, 501. This ground of defence would doubtless have been sufficient had it been answered to an action at law on the policy. A promise by the treasurer to see that the premium is paid is not the equivalent, nor a waiver of the payment. *Buffum v. Fayette Mut. Fire Ins. Co.*, 3 Allen (Mass.), 360. And see also *Mulrey v. Shawmut Mut. Fire Ins. Co.*, 4 Allen (Mass.), 116, which was a case where the policy had been delivered, but the premium had not been paid to the company, though it had been paid to the agent, with whom they settled monthly. The payment of the premium was a condition precedent to the validity of this policy.

² See cases cited *ante*, §§ 23, 63, and *post*, § 65.

refusal of the company to issue the policy thereupon, a bill in equity to enforce the delivery of the policy would have been sustained? If so, how can the intervention of the fire change the obligations of the parties already previously entered into? In *Perkins v. Washington Insurance Company*,¹ and *Palm v. Medina Insurance Company*,² it was held that where a company had authorized their agent to give a receipt which should make the insurance binding from its date, subject however to the proviso that the office should be satisfied with the rate of premium and otherwise satisfied with the risk, they could not arbitrarily refuse to issue a policy, and merely because a fire had intervened. The neglect in this case is the neglect of the company, and differs therefore from the neglect of the agent in *Hoyt v. Mutual Benefit Life Insurance Company*,³ who, after tendering the policy, and requesting payment of the premium, promised to call on a third person, to whom the applicant had referred him for the premium, but did not. This was held to be a merely personal undertaking on the part of the agent, in no way binding upon the company, and the facts and circumstances were not the equivalent of the actual delivery of the policy and payment of the premium.

§ 65. **Countersigning by Agent.** — In general, when the policy provides that the counter-signature of an agent is requisite to the validity of the policy, this counter-signature must be had. But this stipulation in a policy may doubtless be waived. Countersigning by the agent is evidence of the completion and delivery of the contract. Yet if this evidence be wanting, other evidence may be equivalent; as, for instance, a delivery by letter from the agent.⁴ And the counter-signature, at all events, is only necessary when a policy is issued. Though the charter of the company, or general statute law, require the counter-signature of agents to policies, companies may, by themselves or their agents, agree to issue policies, and be bound thereby.⁵ The fact, however, that a policy is issued to

¹ 4 Cowen (N. Y.), 645.

² 2 Ohio, 529.

³ 98 Mass. 539; *ante*, § 55.

⁴ *Myers v. Keystone Mut. Life Ins. Co.*, 27 Penn. St. 268.

⁵ *Walker v. Met. Ins. Co.*, 56 Me. 371; *Kelley v. Com. Ins. Co.*, 10 Bosw. (N. Y. Superior Ct.) 82.

its own agent upon his life, does not dispense with his counter-signature in order to make the policy valid, if the policy itself provides that it shall have no force until countersigned by such agent. Though the agent receive the policy, and place it amongst his private papers, it is no valid contract till it is countersigned by him.¹ The delivery by an unauthorized person of a policy requiring the counter-signature of a particular local agent to make it valid, is of no effect if the counter-signature of the agent is wanting.²

§ 66. **Place of Contract.** — It follows from the rule that the contract is completed when the proposals of the one party have been accepted by the other by some appropriate act signifying the acceptance, that the place of the contract is the place of the acceptance. And if an agent, resident in one State, of an insurance company resident in another, forwards the requisite papers to the home office, and a policy is thereupon issued and mailed directly to the applicant, the contract is a contract made in the State where the home office is situated. And since the acceptance is the test of completion it would seem that a transmission of the policy by mail to the agent, to be delivered by him to the applicant, would have the like effect. And upon this ground it was held, that a New York company which had accepted proposals forwarded by its agent from Ohio, did not come within the statute of Ohio which prohibits foreign insurance companies to insure in Ohio without license.³ If, however, by the terms of the policy, it is not to be binding unless countersigned by an agent resident at a designated place, that place must be regarded as the place where the contract is made, and the laws and usages of that place must govern in the interpretation of the contract.⁴

§ 67. **Cancellation.** — It need hardly be said that when the contract has been once entered into and become binding upon the parties, it cannot be cancelled by either, nor can either party withdraw himself from its obligations without the consent

¹ *Badger v. The American Popular Life-Ins. Co.*, 103 Mass. 244.

² *Lynn v. Burgoyne*, 13 B. Mon. (Ky.) 400.

³ *Hyde v. Goodenow*, 3 Comst. (N. Y.) 266; *Huntley v. Merrill*, 32 Barb. (N. Y.) 656; *Western v. Genesee Mut. Ins. Co.*, 2 Ker. (N. Y.) 258.

⁴ *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416.

of the other. And when negotiations are had between the parties with reference to the abrogation of the contract, the same rules apply as in the making the contract. An agreement to abrogate, cancel, or rescind, can no more be made without mutual consent at some moment of time, than could the original agreement have been made without that consent.¹ The right of cancellation or notice reserved or given by the terms of the policy to either party should be exercised with care that the notice be explicit. A mere notice of a desire to cancel, with an agreement at the same time that the policy may remain till the assured can obtain other insurance, is not such an exercise of the right of cancellation or notice as will relieve a company from the obligations of the policy.² In *Atlantic Insurance Company v. Goodall*,³ it was held that the cancellation took effect in that particular case before it had been assented to by the other party interested. But this was because it was agreed between the parties litigant that, as between them, only one of whom was interested in, or a party to, the cancelled contract, the cancellation should be deemed to take effect before that time. The insurers under a new policy agreed that a surrender of the old policy should protect the newly assured from any danger by reason of a stipulation in the new policy that other insurance not indorsed upon the new policy should render the new policy void. Where the policy had once taken effect, although the insured declared that he would have nothing further to do with the insurers, and that he abandoned the whole thing, but still retained the policy, while the insurers retained the note, and nothing appeared to show that they assented to the abandonment, the plaintiff was afterwards allowed to recover.⁴ And the exercise of the right will also be confined strictly within the terms under which it is allowable by the provisions of the contract. If the contract is made terminable on a refusal to pay an assessment on demand, an illegal assess-

¹ *Alliance Mut. Ins. Co. v. Swift*, 10 Cush. (Mass.) 433; *Sands v. Hill*, 42 Barb. (N. Y.) 651; *Fabyan v. Union Mut. Fire Ins. Co.*, 33 N. H. 233.

² *Goit v. National Protection Ins. Co.*, 25 Barb. (N. Y.) 189.

³ 35 N. H. 328.

⁴ *McAllister Admr'x v. New England Mut. Life Ins. Co.*, 101 Mass. 558.

ment, or one not laid according to the rules by which the insurers are governed, is in point of law no assessment, and the refusal on demand of payment of such an assessment gives no right to terminate the contract.¹

§ 68. If the policy provide the length of the notice to be given, it does not seem to be material that the notice itself makes a mistake in the designation of the date when the policy will become cancelled, provided the required time shall have elapsed between the time when the notice is given and loss shall have happened. Thus where it was provided that after seven days' notice of intention to cancel the insurance should terminate, a notice dated the 13th of February and deposited on that day in the post-office, but not till after the office was closed for the day, which notice was received by the insured on the next day in due course of mail, and informed him that his insurance would terminate on the 20th, the loss not having occurred till the 22d, it was held that the notice was sufficient both within the letter and the spirit of the contract.²

§ 69. So too, a contract of insurance made by what is sometimes called an intermediary receipt given by an agent, that is, a receipt for the premium, containing a statement that the receipt is subject to the approval of the insurers, to be notified to the insured, and certifying that meanwhile the applicant is insured for a specified time, may be cancelled within the time specified, and at any period prior to that time, if notice of disapproval be given. In other words, the certificate of insurance for a specified time pending the negotiation for a policy, does not constitute an absolute contract for that time, but only a conditional contract that the insurance shall extend for so long a time, unless the insurers, having the option to decline the risk, shall sooner signify their determination to decline.³ And the neglect of an agent of the insurers, instructed to give the requisite notice of cancellation and to take other prerequisite steps necessary to its validity, to obey such instructions, will be imputable to the principal, and will not

¹ Matter of People's Mut. Equitable Fire Ins. Co., 9 Allen (Mass.), 319.

² Emmott v. Slater Mut. Fire Ins. Co., 7 R. I. 562.

³ Goodfellow v. Times & Beacon Assurance Co., 17 U. C. (Q. B.) 411.

prejudice the rights of the insured under his contract.¹ The right to cancel a policy, reserved by the company, can only be made effectual by strictly observing the conditions under which the right is to be exercised. An insurance terminable "on giving notice to that effect, and refunding a ratable proportion of the premium, is not cancelled by a notice that the insurers will cancel the policy and return the *pro rata* premium, but will give the insured till a certain day to effect insurance elsewhere. The notice should be that the policy is then and there cancelled, and the *pro rata* premium, sufficient in amount, should be at the same time paid or tendered to the insured. The acceptance of the return premium by the insured, after such insufficient notice, might, indeed, cancel the policy; but the cancellation must be taken to be as of the date of the payment and acceptance of the return premium. Hence, if a fire intervenes between the date of the notice and the acceptance of the return premium, unknown to the insured, he will not lose his right to recover for the loss.²

§ 70. **Accident Insurance. — Insurance Ticket.** — In some branches of accident insurance—railway passengers for instance—it is the practice to issue tickets, the nature of the business being such that there is not the time to follow the routine usual in other kinds of insurance. These tickets³ are made out and signed at the company's office, and transmitted to their agencies to be sold indifferently to all who apply for them. The sale and delivery by an agent, or by any one in his employ, and the payment of the price, give the owner a valid claim against the company, subject to the conditions set forth in the ticket.⁴

¹ Franklin Fire Ins. Co. v. Massy, 33 Penn. St. 221.

² Van Valkenburg v. Lexington Ins. Co., N. Y. (Com. of App.) Jan. 1873, 2 Ins. L. J. 205; Lyman v. State Mut. Fire Ins. Co., 14 Allen (Mass.), 329.

³ The following is a sample of such tickets, styled a "General Accident Ticket": "The — company of — will pay the owner of this ticket — dollars per week in case of personal injury causing total disability, for a period not exceeding — weeks, or the sum of — dollars to his legal representatives in the event of his death, from personal injury, ensuing within — months from the happening thereof, when caused by any accident while travelling by public or private conveyance, provided for the transportation of passengers in the —, it being understood that the policy covers no description of war risk."

⁴ Brown v. Railway Passengers Assurance Co., 45 Mo. 221.

CHAPTER IV.

OF THE SUBJECT-MATTER OF THE CONTRACT.

§ 71. **What may be insured.** — One may insure that in which he has an interest, and which the law does not forbid to be insured. There are certain unlawful enterprises in which property may be embarked, but, being unlawful, the law will not uphold any contract of insurance or other contract in favor of them, which has for its purpose to aid or in any way promote the success of such enterprises by protecting the property embarked therein. Of this kind of enterprises the slave-trade is an example. The same may be said of lotteries. Neither will insurance protect property which it is unlawful to have. Whatever the law discourages and disapproves of, whether by special statute or upon general principles enforced by the common law in the interest of good morals, good order, and general public policy, will not be fostered or encouraged by insurance.¹

§ 72. Subject to the limitation stated in the preceding section, whatever has an appreciable pecuniary value, and is subject to loss or deterioration, or of which one may be deprived, or which he may fail to realize, whereby his pecuniary interest is or may be prejudiced, may properly constitute the subject-matter of insurance.² It may have neither a corporeal existence, nor marketable value, nor an actual but only a potential being; for it is not so much the right, thing, or expectancy which is insured, as the possessor himself, against the loss or damage which unforeseen events may bring thereto. When, therefore, the subject-matter of insurance is termed, as it fre-

¹ Boulay-Paty, Cours de Droit Com. title x. § 5, who cites Kuricke, Diatr. Assec. *Assecurari possunt, omnia quæ assecurari nec de jure, nec de consuetudine, quæ vim juris habet, prohibentur.* Mount et al. v. Waite, 7 Johns. (N. Y.) 434; Lord v. Dall, 12 Mass. 115; *ante*, § 7.

² Pardessus, Cours de Droit Com. 589, 2 & 4.

quently is, the aliment of the contract, it is not to be understood that this aliment is something upon which the contract fastens and feeds, to which it clings, and from which it is inseparable. In popular language, a house is said to be insured; but in point of fact the owner is insured on, or in respect of, the house, or, in other words, against any loss which may happen to him while he is owner and because of his ownership, absolute or qualified. When this ownership ceases, the property also ceases to furnish aliment for the contract, and it dies. It is the union between the two — between the person with whom the contract is made and the subject-matter about which it is made, in the relation of the possessor to the thing possessed — that keeps alive the contract. And when this union is permanently sundered before loss or the event insured against happens, the contract loses its vitality. A transfer of the property and an assignment of the policy is not a prolongation of the life of the contract, but a new contract with another person about the same subject-matter.¹

§ 73. Under these qualifications the contract may embrace not only personal property and real estate, but the lives of animals, among which slaves are included for this purpose; the life, health, and personal liberty of man; the solvability of a debtor; the payment of a note at maturity;² the fidelity of a servant; expected profits; the damages to which growing crops are exposed from frosts and storms; the risk of death or injury by accident to the person in travelling or otherwise; lottery tickets, where lotteries are permitted; the risk of loss of property by the capture of a fort by an enemy;³ the danger of loss by dishonesty, fraud, and theft, or by the non-payment of rent, interest, or income, or by the invalidity of titles, or by the death of one upon whom depends the continuance of pecuniary support or assistance: and, in general, “it is applicable,” to use the language of Mr. Justice Lawrence,⁴ “to protect men

¹ *Wilson v. Hill*, 3 Met. (Mass.) 66; *Carpenter v. Prov. Wash. Ins. Co.*, 16 Peters (U. S.), 495.

² *Ellicott v. United States Ins. Co.*, 8 Gill & Johns. (Md.) 166.

³ *Carter v. Boehm*, 3 Burr. 1905.

⁴ *Lucena v. Crawford*, 2 New Rep. 301.

against uncertain events which may in any wise be of disadvantage to them." In most of these instances the contract has been successfully applied. Of their respective peculiarities we shall have occasion to treat more at length hereafter. The practice of insuring crops is much in vogue in France;¹ and guarantee insurance, as it is called, instituted as a substitute for private suretyship, to aid persons in obtaining places of trust and responsibility, and to protect employers from the unfaithfulness of employés, has met with some success in England.

§ 74. *Insured must have an Interest.*—When there is no interest at all to be protected, a policy of insurance will be invalid, as counter to the spirit and purpose of the contract, as well as against public policy. Insurance is made for the benefit and protection of legitimate business and purposes, and not that persons unconcerned therein, and without any interest in the property or event, should profit thereby. And although innocent wagers were once sustained, the courts will not waste their time in discussing the question whether what is substantially a wager ought or ought not to be upheld upon any grounds. Under the influence of a healthy public sentiment they have become impatient of investigating disputes founded upon any species of gambling, and almost without exception refuse to enforce a contract supported by such a subject-matter.² Insurance of interests prohibited by law, and insurance without interest, if included in the same policy with interests which may be lawfully insured, do not vitiate the policy, except as to the prohibited or non-existent interests. It remains valid for so much as constitutes a legitimate insurable interest.³ If, however, where several parcels of property,

¹ Pardessus, *Droit Com.* 589.

² *Sadler's Co. v. Badcock*, 2 Atk. 554; 19 Geo. II. c. 37; *Kent v. Bird*, Cowp. 583; *Amory v. Gilman*, 2 Mass. 1; *King v. State Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 10; *Prichett v. Ins. Co. of North America*, 3 Yeates (Penn.), 464; 3 Kent, Com. 278; *Ruse v. Mut. Benefit Life Ins. Co.*, 23 N. Y. 516; *Fowler v. New York Indemnity Ins. Co.*, 26 N. Y. 422; *Freeman v. Fulton Fire Ins. Co.*, 38 Barb. (N. Y.) 247; s. c. 14 Abbott, Pr. Cases, 398.

³ Of what may constitute an insurable interest we shall speak further on in this chapter.

separately valued, are insured by a policy by its terms made void if the true titles be not stated, the title of either parcel be untruly stated, there can be no recovery for the loss of either parcel.¹

§ 75. Although policies of insurance made for the benefit of parties who have no interest in the property or event which constitutes the subject-matter of insurance are inconsistent with the true principles of insurance, yet the courts, in the early history of the contract in cases of marine insurance, "interest or no interest," looking upon such policies as in the nature of an innocent wager, and therefore sustainable at common law, manifested a disposition to uphold them.² But both in England and in some of the States of this country the legislative power has intervened and expressly declared the invalidity of policies without interest. And where this intervention has not taken place the courts now, nearly without exception,³ hold such policies void, not only because in contravention of the fundamental object of the contract, indemnity, since where there is no interest there can be no loss, and where there is no loss there can be no indemnity, but because, when the insured has nothing to lose, but every thing to gain, by the happening of the event insured against, it would be dangerous and demoralizing to subject the insured to so great a temptation to destroy the property or the life upon which the insurance is effected. A sound public policy will not sanction any such temptation. And, indeed, the nearer the insured is brought by the terms of the contract into such a position that he can in no event be the gainer, the more nearly will the contract conform to the true principles

¹ Day v. Charter Oak Fire and Mar. Ins. Co., 51 Me. 91.

² "There is some strange language," says Lord Eldon, — *Lucena v. Crawford*, 2 New Rep. (5 Bos. & Pul.) 322, — "to be found in our books respecting wagering and valued policies, the latter of which, though frequently in effect wagering policies, have been permitted because it has been supposed that the convenience of them is greater than would result from the prohibition of them."

³ In New Jersey, in 1854, it was said, though the case did not require the point to be decided, that a life policy without interest is an innocent wager and good at common law. *Trenton Mutual Life and Fire Ins. Co.*, 4 Zab. (N. J.) 576; *Ruse v. Mut. Benefit Life Ins. Co.*, 23 N. Y. (9 Smith) 516. And perhaps the same would be held in Rhode Island. *Mowry v. Home Ins. Co.*, 9 R. I. 1

of insurance. In accordance with this view, the better class of insurers not only take the smallest risks in proportion to the total value of the thing insured, but exercise the greatest caution lest the total valuation should be fixed at so high a rate, as practically to offer to the insured a margin of profit, beyond the actual indemnity, in case of loss.

§ 76. *Insurable Interest.* — As to what amounts to an insurable interest there has been much discussion in the courts, without hitherto arriving at any satisfactory definition. It may be said generally, however, that while the earlier cases show a disposition to restrict it to a clear, substantial, vested pecuniary interest, and to deny its applicability to a mere expectancy without any vested right, the tendency of modern decisions is to relax the stringency of the earlier cases, and to admit to the protection of the contract whatever act, event, or property bears such a relation to the person seeking insurance that it can be said with a reasonable degree of probability to have a bearing upon his prospective pecuniary condition.¹ An insurable interest is *sui generis*, and peculiar in its texture and operation. It sometimes exists where there is not any present property, — any *jus in re* or *jus ad rem*. Yet such a connection must be established between the subject-matter insured and the party in whose behalf the insurance has been effected as may be sufficient for the purpose of deducing the existence of a loss to him from the occurrence of an injury to it.²

§ 77. The question, what constitutes an insurable interest, was much discussed, but not decided, as long ago as 1806, in a noted case in which the several judges who gave their opinions seem to have given the matter their careful consideration. Their conflicting views very well illustrate the diffi-

¹ It was said in *Mitchell v. Home Ins. Co.*, 32 Iowa, 424, that whether there is an insurable interest is a question for the jury, under proper instructions. But this, in view of the universal current of authorities, can only mean that the court are to say that if certain facts are found to be true, then there is, or is not, as the case may be, an insurable interest. In other words, the facts being proved, it is a question of law, whether there arises out of them an insurable interest.

² *Warren v. Davenport Fire Ins. Co.*, 31 Iowa, 465.

culties of the question. The facts in the case were as follows : Certain ships, with their cargoes, belonging to subjects of the United Provinces, by direction of the admiralty had been seized by a British man-of-war and ordered home. The defendants in error were by statute made commissioners, with authority to take into their possession and under their care, and to manage, sell, or otherwise dispose of to the best advantage, all such ships and cargoes as had then been or might thereafter be detained in or brought into the ports of the United Kingdom, and had accordingly insured these ships and cargoes ; but before arriving at any port of the United Kingdom they were lost. The question was whether the defendants in error had an insurable interest. And it was said on the one side, that though it were conceded that the commissioners had no scintilla of right in possession or reversion, yet they had a contingent interest founded on the statute, their commission, and the seizure, which made it their duty by all lawful means to provide for the preservation of the property till they should come into possession ; that a contingent interest is sufficient, and a vested interest is not necessary ; that nothing stood between the commissioners and the vesting of the contingent interest but the perils insured against, and, in fact, they lost by the perils of the sea what, but for those perils, would have vested in them absolutely ; that though an interest may be prevented from vesting by other events than the perils insured against, as by the countermand of a consignor, yet this possibility of countermand will not take away the right from the consignee to insure, and that where there is an expectancy coupled with a present existing title, there is an insurable interest ; that inchoate rights, such as freight, respondentia, and bottomry, and wages (though the insurance of the latter is universally prohibited on grounds of public policy), founded on subsisting titles, lands, charter-parties, and agreements, are insurable ; that the object of insurance is to protect men against uncertain events which may in any wise be of disadvantage, not only those persons to whom positive loss may come by such events, occasioning the deprivation of that which they may possess, but those also who, in con-

sequence of such events, may have intercepted from them the advantage or profit which, but for such events, they would acquire according to the ordinary and probable course of things ; that though a man must somehow or other be interested in the preservation of the subject-matter exposed to perils, yet to confine the contract to the protection of the interest which arises out of property is adding a restriction to the contract which does not arise out of its nature ; that a man is interested in a thing, to whom advantage may accrue or prejudice may happen from the circumstances which may attend it, and whom it concerneth that its condition as to safety or other quality should continue ; that interest does not necessarily imply a right to the whole or a part of a thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to or concern in the subject-matter of insurance, which relation or concern, by the happening of the perils insured against, may be so affected as to produce damage, detriment, or prejudice to the person insuring ; and when a man is so circumstanced with respect to matters exposed to risks or dangers as to have a moral certainty of advantage or benefit but for those risks or dangers, he may be said to be interested in the safety of the thing ; that to be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefit from its existence or prejudice from its destruction ; and that the property of a thing and the interest derivable from it may be very different, the price being generally the measure of the first, while by interest in a thing every benefit and advantage arising out of or depending on such thing may be considered as being comprehended.¹

§ 78. On the other hand, it was said that the mere naked expectation of acquiring a trust or charge respecting property without a scintilla of present interest, either absolute or contingent, in possession, reversion, or expectancy, in the proper legal sense of the word, can be no foundation for an insurable interest ; that that intermediate thing between a strict right,

¹ *Crawford v. Hunter*, 8 T. R. 13 ; *Lucena v. Crawford*, 3 Bos. & Pul. 75 ; s. c. H. of L. 2 New Rep. (5 Bos. & Pul.) 299 ; s. c. 1 Taunton, 324.

or a right derived under a contract, and a mere expectation or hope, which is said to constitute an insurable interest, and which is sometimes termed a moral certainty, is so shadowy as to be totally incapable of legal definition; that what is the difference between a moral certainty and an expectation no one can tell; and that in point of fact there can be no insurable interest where there is no right in the property, or a right derivable out of the property by virtue of a contract relative thereto, which, in either case, may be lost upon some contingency affecting the possession or the enjoyment of the party having the property or right; and that an expectation of a grant or trust or possession, founded upon great probability, is not an insurable interest, nor would it be, whatever might be the chances in favor of the expectation. In other words, as was tersely said by Lord Ellenborough in a subsequent case while discussing the same question, "a man has no right to an indemnity because he has lost the chance to receive a gift."¹

§ 79. **Expected Profits.** — Expected profits may be insured both in this country and England, though the rule in France is different, where only an acquired profit may be insured. But the insured must have an interest in the property out of which the profits are expected to proceed, and the profits must be insured as profits.² "It is not necessary," says Alauzet,³ "to the validity of the contract that the thing exist, and that the interest be born at the moment of the making of the contract. Thus crops may be validly insured against hail and frost or any other risk, even before they are sown; but from

¹ Ibid.; *Routh v. Thompson*, 11 East, 426. In this discussion were engaged, on one side or on the other, most of the judges of the different courts, and amongst them some of the ablest that ever adorned the British judiciary; and in its different stages the cause will be found to be an invaluable storehouse of learning upon this much vexed question of insurance law, which will abundantly reward the most careful perusal.

² *Sun Fire Office v. Wright*, 3 N. & M. 819; s. c. 1 A. & E. 621; *Barclay v. Cousins*, 2 East, 544; *Grant v. Parkinson*, Park, 402; s. c. Marsh. Ins. 95; *Putnam v. Mercantile Ins. Co.*, 5 Met. 391; *Loomis v. Shaw*, 2 Johns. Cases, 36; *Niblo v. N. A. Fire Ins. Co.*, 1 Sandf. (N. Y. Superior Ct.) 551; *Leonarda v. Phenix Assurance Co.*, 2 Rob. (La.) 131.

³ *Traité Gen. des Assurances*, 153; *Pardessus, Droit Com.* 589.

the moment when the crop begins to take root or branch, the contract will be perfect and susceptible of execution. Until then it is only a conditional insurance.”¹ And such expected profits are still insurable though the insured may have no absolute ownership in the property out of which the profits are expected to arise, but merely a right, if he should so elect, to take it on certain terms and conditions, in a certain event, as where one purchases for a consideration, then paid, the right to take a portion of a cargo expected to arrive, on the payment of a certain further sum, if on the arrival he shall so elect.² But though there be an ownership in the property, if before it comes to the possession of the purchaser he becomes insolvent, and the goods are intercepted by the vendor by right of stoppage *in transitu*, there being no longer either property or any expectation of profits thereon, there can be no recovery under the policy.³

§ 80. **Insurable Interest, who may have.**—The mortgagee, being the owner of a limited interest in the estate, has in his own right an insurable interest to the amount of the mortgage debt.⁴ So have executors an insurable interest in the property of the testator which the executor is bound to protect,⁵ and administrators in the like property of the intestate,⁶ and trustees in property under their charge,⁷ and sheriffs in property attached.⁸ So also have consignees, common carriers, and supercargoes under instructions to land the goods and wait for a market,⁹ or when compensation depends upon the safety of the cargo;¹⁰ captors, having a well-founded expecta-

¹ *Grant v. Parkinson*, 3 Bos. & Pul. 85.

² *French v. Hope Ins. Co.*, 16 Pick. 397.

³ *Clay v. Harrison*, 10 B. & C. 99.

⁴ *Carpenter v. Washington Ins. Co.*, 16 Pet. (U. S.) 475; *Keller v. Merchants' Ins. Co.*, 7 La. 29; *Addison v. Louisville Ins. Co.*, 7 B. Mon. (Ky.) 470.

⁵ *Phelps v. Gebhard Fire Ins. Co.*, 9 Bosw. (N. Y. Superior Ct.) 404.

⁶ *Herkimer v. Rice*, 27 N. Y. 163.

⁷ *Ins. Co. v. Chase*, 5 Wall. (U. S.) 509.

⁸ *White v. Madison*, 26 N. Y. 117.

⁹ *Deforest v. Fulton Fire Ins. Co.*, 1 Hall (N. Y.), 184; *Waters v. Monarch Fire and Life Ins. Co.*, 5 El. & Bl. 870; *Ætna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242.

¹⁰ *Robinson v. New York Ins. Co.*, 2 Caines (N. Y.), 357.

tion that their claim will be allowed ;¹ and pledgees, innkeepers, factors, wharfingers, pawnbrokers, warehousemen, and, generally, persons charged either specially, by law or by custom or by contract, with the duty of caring for and protecting property in behalf of others, or having a right so to protect such property, though not bound thereto by law, or who will receive benefit from the continued existence of the property, whether they have, or have not, any title, lien upon or possession of, it, have an insurable interest.² Indeed, the law has gone very near to holding a lawful possession to be an adequate interest to support the contract.³

§ 81. *Divers Interests in same Subject-matter.*—Many are the rights amounting to an insurable interest which different parties may have in the same subject-matter. Of course the owner in fee of real estate may insure, and his interest not only continues after a mortgage, but it even survives a sale of the equity of redemption or execution until his right to redeem under that sale expires.⁴ In personal as well as real property there is an insurable interest while there is any right to redeem.⁵ So may the owner of a leasehold estate insure,⁶ especially if he own the building ;⁷ so may a husband as tenant by the curtesy, after issue born alive, though the wife be only a joint tenant ;⁸ and so, too, if he lives with his wife, and shares with her the use of her own separate personal property.⁹

¹ *Stockdale v. Dunlop*, 6 Mees. & Wels. 224.

² *Eastern R. R. Co. v. Relief Fire Ins. Co.*, 98 Mass. 420. And see *post*, §§ 89, 90.

³ *Sutherland v. Pratt*, 11 Mees. & Wels. 296 ; *Barclay v. Cousins*, 2 East, 544. But see *post*, § 97.

⁴ *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40 ; *Columbian Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 725.

⁵ *Allen v. Franklin Fire Ins. Co.*, 9 How. (N. Y.) 501 ; *Franklin Ins. Co. v. Findlay*, 6 Whart. (Penn.) 483.

⁶ *Saddlers' Co. v. Badcock*, 1 Wil. 10 ; s. c. 2 Atk. 534 ; *Niblo v. North American Ins. Co.*, 1 Sandf. (N. Y. Superior Ct.) 551.

⁷ *Fletcher v. Commonwealth Ins. Co.*, 18 Pick. (Mass.) 419 ; *Laurent v. Chatham Fire Ins. Co.*, 1 Hall (N. Y.), 41 ; *Tongue v. Nutwell*, 31 Md. 302.

⁸ *Franklin Ins. Co. v. Drake*, 2 B. Mon. (Ky.) 47 ; *Abbott v. Hampden Mut. Fire Ins. Co.*, 30 Me. 414 ; *Harris v. York Mut. Ins. Co.*, 50 Penn. St. 341. And see also *Curry v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535.

⁹ *Goulstone v. Royal Ins. Co., Fost. & Fin.* (N. P.) 276 ; *Clark v. Fireman's Ins. Co.*, 18 La. 431.

Upon the same principles a tenant in dower may doubtless insure. So the assignee of a bond for a deed of real estate upon which the obligee has made improvements has an insurable interest.¹ A disseisor may be considered as the owner, so far as to give him an insurable interest, especially if the disseisee's right of entry is tolled ; for if the disseisee has no right to enter, but only a right of action, he is not the absolute owner of the land, — the disseisor is the owner under a title which is defeasible.² Rent is itself a distinct insurable interest, and is not a proper item of loss to enhance the damages under a policy insuring the building.³

§ 82. **Mortgagor and Mortgagee.**—A mortgagor whose equity of redemption has been foreclosed, has nevertheless an insurable interest, so long as the mortgage debt remains unpaid, on account of his liability therefor ;⁴ and the holder of a mortgage as collateral security for a debt has an insurable interest in the mortgaged property, while the debt for which the mortgage is pledged as collateral remains unpaid.⁵ Successive mortgagees, holding claims upon the same property at the same time, may each insure their respective interests.⁶

§ 83. **Mortgagee.**—The amount of interest or its character is not material, in determining the question whether a party who attempts to recover under a policy has an insurable interest. A mortgagee's interest, as we have already seen, in the protection of the property as a fund out of which to pay the debt, is undoubtedly insurable ; and he does not lose that insurable interest, although he sell and assign the mortgage and the note thereby secured, if he indorse the note. His responsibility for the debt remaining, he is still interested in the preservation of the property, out of which to pay what has ceased to be a debt due him indeed, but nevertheless a debt due another, which he has assumed, in a certain contingency, to pay.⁷

¹ *Sayres v. Hartford Fire Ins. Co.*, 17 Iowa, 176.

² *Curry v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535.

³ *Leonarda v. Phoenix Assurance Co. of London*, 2 Rob. (La.) 131.

⁴ *Buffalo Steam-Engine Works v. Sun Mut. Ins. Co.*, 17 N. Y. 401.

⁵ *Sussex County Mut. Fire Ins. Co. v. Woodruff*, 2 Dutch. (N. J.) 541.

⁶ *Fox v. Phoenix Fire Ins. Co.*, 52 Me. 333.

⁷ *New England Fire and Mar. Ins. Co. v. Wetmore et al.*, 32 Ill. 221.

§ 84. **Lessee and Lessor.**—The interest of a lessee is based upon his right to the possession and use, his liability to repair or for waste, or his covenant or parol agreement¹ to keep insured, and may exist whether he be tenant for years or at will. In England the incumbent of a benefice, and generally the tenants of ecclesiastical property, whether in possession or not, and other persons bound by custom or otherwise to repair, are considered to have an insurable interest.² A sub-lessee by parol, who rents a building on the leased land, has an insurable interest in the building.³

And it seems that a possession under such circumstances that the tenant may be liable as a wrong-doer gives an insurable interest, as appears by the following interesting case: The city of New York had leased a plot of ground for the Crystal Palace building to an association which failed, and a receiver was appointed by the court under the statute relating to the dissolution of corporations. The receiver held possession of the property some year and a half after the lease expired, when the plaintiffs entered by force and took possession, and then procured this insurance. The court observed, that if the building was to be considered as the property of the lessee at the termination of the lease, the plaintiffs were liable to be charged for its value as wrong-doers, at the suit of the receiver, after they had forcibly ejected him and taken possession thereof. The plaintiffs were in possession under a claim of ownership. The receiver can maintain no action to recover the actual possession of the building since its destruction, and a recovery against the plaintiffs for the value, by way of damages, would vest the ownership in them, even though they acquired no title in it by the conditions of the lease and the expiration of the term. And so on this ground there was an insurable interest.⁴ So, too, a landlord has an insurable interest in the goods of his tenant liable to distress for rent.⁵

¹ *Lawrence v. St. Mark's Fire Ins. Co.*, 43 Barb. (N. Y.) 479.

² *Bunyon, Fire Ins.* 17.

³ *Mitchell v. Home Ins. Co.*, 32 Iowa, 421.

⁴ *Mayor, &c., of New York v. Brooklyn Fire Ins. Co.*, 41 Barb. (N. Y.) 231.

⁵ *Columbia Ins. Co. v. Cooper*, 50 Penn. St. 331.

§ 85. **Lessor.**—Of course when a building is erected by the lessee, and reverts to the lessor at the expiration of the lease, an insurable interest exists in the lessor from the time of the reversion.¹ In *Macarty v. Commercial Insurance Company*,² it is said that a donor who has given a deed of his property *inter vivos*, and at the delivery of the deed has by parol agreed with the donees that he shall retain the estate during his life, and does in fact retain it, taking the profits and paying taxes and making repairs, has no insurable interest. But the case is hardly an authority, as it went off upon other points. So if the lessee has a right to remove the buildings at the expiration of the lease, as their destruction will diminish the lessor's security for rent, he may insure for his protection.³

§ 86. **Equitable Title.**—The plaintiff advanced money to a builder, and took his notes, secured by a deed in trust to a third party in payment. The maker of the notes was unable to pay them at maturity, and it was agreed that the plaintiff should surrender the notes and take possession of the property, which he accordingly did, with the assent of the trustee, who delivered to him the deed of trust. At the time insurance was effected, the plaintiff had so held the property for about two years, and it was held that he had an insurable interest.⁴

§ 87. **Intruder.**—It has been held, however, that when a person is a mere intruder, and has no license or permission to occupy land belonging to another, he can have no insurable interest in buildings which he may erect thereon. Thus, certain parties jointly agreed to build a hotel on the beach on land belonging to the State, without lease or other permission. The plaintiff, one of the corporation, contracted with the rest to build the house, and by virtue of the contract became a creditor of the company. After it was built, several of the joint proprietors being unable to pay, their interest was transferred to the plaintiff, who thenceforth for two or three years used and occupied the premises, and at length procured insurance

¹ *Mayor, &c., of New York v. Exchange Fire Ins. Co.*, 9 Bosw. (N. Y.) 424; *Same v. Brooklyn Ins. Co.*, 41 Barb. (N. Y.) 231.

² 17 La. 365.

³ *Miltenberger v. Beacom*, 9 Penn. St. 198.

⁴ *Coursin v. Penn. Ins. Co.*, 46 Penn. St. 323.

thereon. But the court said they had no rights individually or collectively; they were mere intruders, and had no interest which the law could in any way recognize.¹

§ 88. **Stockholder in Corporate Property.** — *Philips v. Knox County Mutual Insurance Company*² has been regarded as an authority that the stockholder of an incorporated company has no insurable interest, though he own all the stock of the company. But the real question in this case seems to have been whether the stockholder truly represented the title when he stated that the property was his, the insurers by their charter being entitled to a lien, and whether the insured was the owner in fee, in which case only the insurance was to be binding.

But in *Warren v. Davenport Fire Insurance Company*³ the point was distinctly made, and decided in the affirmative. Upon full consideration the court held that a stockholder is clearly interested in the preservation of the property which gives value to his stock, and out of which come the dividends, and that the interest is of such a nature as to be insurable. The court refer to the Ohio case just cited, and, after pointing out the fact that the case turned upon the provision of the charter making the policy void if the true title be not stated, well observe that a mortgagee who had represented the property as his own would have failed in the same case, and for the same reason.

§ 89. **Incomplete Title.** — Insurable interest does not at all depend upon the completeness or validity of the title by which the insured property is held. Thus possession under a contract of sale upon which partial payment has been made, may give an insurable interest, although the conditions of the contract have been so far violated, that, if the breach be insisted on, the contract cannot be enforced, since the contract, notwithstanding the breach of its conditions, may be carried into effect by the parties in interest.⁴ And this is true, though the

¹ *Sweeney v. Franklin Ins. Co.*, 20 Penn. St. 337.

² 20 Ohio, 178.

³ 31 Iowa, 463.

⁴ *Tyler v. Aetna Fire Ins. Co.*, 16 Wend. (N. Y.) 385; s. c. 12 Wend. (N. Y.

vendor, availing himself of the violation of the conditions by the vendee, has resold the property, and is resisting a proceeding in equity brought by the vendee to compel a conveyance. If this were not so, the property might be destroyed pending the litigation, to the prejudice of the vendee should he ultimately prevail.¹

§ 90. And it has been held in Tennessee that this interest exists under the following state of facts: The plaintiff had purchased the property at a sale on execution. He had neither paid the purchase-money nor any part thereof, nor had he received or been tendered a deed. Some arrangement was made with the creditors for time, and there was some understanding with the execution debtor that he was to hold the property as security for the amount bid, and other debts for which the plaintiff was liable to him. After the loss, the plaintiff being still delinquent in the payment of the purchase-money, the property was resold to another person.² So one who holds property by a conveyance which is fraudulent as against creditors, has an insurable interest.³

§ 91. **Administratrix.**—An administratrix was held to have an insurable interest under the following state of facts: The husband before his death agreed with the defendants for a policy upon his building and machinery. Before, however, the policy was issued, he died, and the policy was afterwards issued, insuring his "estate." In a suit brought on the policy assigned after the loss, and brought by the assignee, it was contended, on the part of the defendants, that the "estate" of the husband meant his administratrix, and that she as such administratrix had no interest in the realty. But the court said it was apparent that both parties intended that the building as well as the machinery should be insured, for so expressly said the policy; and as the heirs had the chief interest in the real estate, it might fairly be presumed without the aid

507; *Columbian Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 25; s. c. 10 Pet. (U. S.) 507; *McGivney v. Phoenix Fire Ins. Co.*, 1 Wend. (N. Y.) 85; *Smith v. Bowditch Ins. Co.*, 6 Cush. (Mass.) 448.

¹ *Milligan v. Equitable Ins. Co.*, 16 Upper Canada (Q. B.), 314.

² *Etna Ins. Co. v. Miers*, 5 Sneed (Tenn.), 139.

³ *Lerow v. Williams*, 9 Allen (Mass.), 382.

of extraneous evidence, that such insurance was effected for their benefit. If, however, this were doubtful, extraneous evidence might be adduced to ascertain, in all cases of ambiguity in this respect, what interests were intended to be insured.¹

§ 92. **Insolvent.** — Insolvent debtors and bankrupts may also have an insurable interest. Thus, an insolvent having obtained his discharge, acquired property and insured it. Subsequently, and after the loss, the creditors discover that the discharge was obtained by fraud, and upon proper proceedings had in court the discharge was revoked. Under the English insolvent law, all the property which the insolvent has at the time of filing his petition, and all which he shall acquire before he becomes entitled to his discharge, vests in his assignee.² It was contended that as the order for the insolvent's discharge had been annulled, he was in the same position as if the discharge had never been granted, and consequently the assignee was entitled to the property in question, and might compel the insurance company to pay the loss to him. A party who insures, it was contended, must have a real and tangible, and not a merely speculative, interest in the property insured. But by Pollock, C. B.: "It is enough if he is responsible to some person for the property. There are many cases on marine policies which show that if a person can be called upon to account for property he has an insurable interest in it." And per Alderson, B.: "The insolvent having possession of the property is responsible for it to his assignee. Then why may he not insure it?" After advisement, it was held that, as the insolvent was in possession as the apparent owner, responsible to those who were the real owners, he might insure.³ And the insurable interest remains even though the insolvent has concealed his goods from his creditors.⁴

§ 93. **Lien.** — Where by statute the mechanic has a lien for labor and materials furnished in the erection of a building, he has an insurable interest in the building. The lien attaches

¹ *Clinton v. Hope Ins. Co.*, 51 Barb. (N. Y.) 647.

² 1 & 2 Vict. c. 110, § 37.

³ *Marks v. Hamilton*, 7 Wels. Hurl. & Gor. (Exch.) 323.

⁴ *Goulstone v. Royal Ins. Co.*, 1 F. & F. (N. P.) 276.

from the commencement of the labor and the furnishing the materials. Nor is it necessary that the validity of the lien should have in any way been brought to judicial cognizance. Before judgment, and even before filing the claim, if the period within which the claim must be filed has not transpired, the interest subsists.¹ And it has been intimated that a contractor would have an insurable interest in the house he was engaged in building, irrespective of his statutory lien, if his compensation in any way depended upon the completion of the house; or in other words, if by contract or custom he was not to be paid till the house was finished.² But a general lien, like that of a judgment in some States, where by law it is a lien first upon the personal estate of the judgment-debtor, and then upon his real indiscriminately, does not give an insurable interest in the whole or any part of the debtor's property to the judgment-creditor, and in this respect is to be distinguished from a mortgage, which is a specific pledge of definite property, and gives the mortgagee an insurable interest.³

§ 94. **Liability for Loss.** — In Maine, Massachusetts, and probably other States, railroads are by statute given an insurable interest in buildings and other property along the line of the road, for the loss of which by fire communicated from the engine, they would be responsible.⁴ The interest here is analogous to that of the common carrier, who is an insurer by the common law, or to that of an underwriter who is an insurer by contract.⁵ Such insurable interest has been held to exist in growing timber located at a distance of three hundred feet from the line of the road,⁶ or even half a mile dis-

¹ *Franklin Fire Ins. Co. v. Coates*, 14 Md. 235; *Carter v. Humbolt Fire Ins. Co.*, 12 Iowa, 284; *Stout v. City Fire Ins. Co.*, ib. 371; *Longhurst v. Star Ins. Co.*, 19 Iowa, 364.

² *Protection Ins. Co. v. Hall*, 15 B. Mon. (Ky.) 411.

³ *Grevemeyer v. Southern Mut. Ins. Co.*, 62 Penn. St. (P. F. Smith, 12) 340.

⁴ *Chapman v. Atlantic and St. Lawrence R. R. Co.*, 37 Me. 92; *Hart v. Western R. R. Co.*, 13 Met. (Mass.) 99; *Hookset v. Concord R. R. Co.*, 38 N. H. 242.

⁵ *Eastern R. R. Co. v. Relief Fire Ins. Co.*, 98 Mass. 420.

⁶ *Pratt v. Atlantic and St. Lawrence R. R. Co.*, 42 Me. 579.

tant, where the fire starting in the grass adjacent to the road extends continuously to the wood.¹

§ 95. **Debtor in Property Attached.** — Where the goods of an assured were levied upon by the sheriff by virtue of an execution against him, and the sheriff took actual possession of the goods, and left them in the store of the assured, the doors of which he fastened and the windows of which he nailed up, and the sheriff went out of town and took the key of the store with him, and during his absence a fire took place, which destroyed the store with its contents, it was held that the insured was nevertheless entitled to recover.² In this case it was urged by the counsel for the plaintiffs in error that the question was not one of an insurable interest, but of a change of interest and risk produced by extrinsic circumstances. But the court, per Kennedy, J., did not acquiesce in this view of the case. They held that the position that the assured could not recover on his policy for the loss of a diminished interest was untenable; nor did they admit that the interest in this case was a diminished interest; for the loss must fall upon the defendant in error, neither the sheriff nor the plaintiffs in the execution being in default, unless he could obtain remuneration from the insurers upon the policy; and he was still liable on the judgment obtained against him to pay the debt for which his goods were taken on execution.

Bailee of Attached Property. — A bailee, who has given a bond to dissolve an attachment, and is under obligation to produce the property to respond to the judgment, has an insurable interest.³

§ 96. **Vendee without Title.** — It has been said that an interest in goods under a contract which cannot be enforced as being in contravention of the Statute of Frauds, is not an insurable interest. Thus, where by verbal agreement the plaintiff had agreed to purchase oil to arrive, and to be paid for if it arrived, but not otherwise, and it was lost, it appearing that the contract was one which, by the Statute of Frauds,

¹ *Perley v. Eastern R. R. Co.*, 98 Mass. 414.

² *The Franklin Fire Ins. Co. v. Findlay*, 6 Whart. (Penn.) 483.

³ *Firemen's Ins. Co. v. Powell*, 13 B. Mon. (Ky.) 312.

is required to be in writing, it was held that he had no insurable interest.¹ And so where the plaintiff held an instrument made by the captain of a vessel, in the nature of a mortgage, to secure the plaintiff for money loaned with which to pay for repairs on the vessel, as the instrument was one which the captain of the vessel had no right to make, and was therefore void, the court said it did not give to the plaintiff an insurable interest.² Upon the doctrine of these cases it has been stated, as a general proposition, that a right under a contract not enforceable at law or equity, will not support a policy of insurance, and among such contracts would be included a verbal contract for the purchase of real estate, when it is not aided by part performance.³

§ 97. **Vendor in Possession, but without Title.**—In *North British and Mercantile Insurance Company*,⁴ goods on a wharf were insured as “the assured’s own, in trust or on commission, for which the assured was responsible.” The assured had sold a portion of the goods destroyed and received the pay therefor, but still held the wharfinger’s delivery-warrant for the goods on behalf of the purchaser, though merely for the convenience of paying the charges necessary to clear the goods; and it was held that the goods had passed to the purchaser, so that the vendor, the assured, had no longer, at the time of the fire, any interest in the goods, or any responsibility therefor.

Holder of Promissory Note.—The holder of a note may insure its prompt payment, and the assignee of the policy, that being negotiable, has an insurable interest.⁵ And so a

¹ *Stockdale v. Dunlop*, 6 Mees. & Wels. 224.

² *Steinback v. Fenning*, 6 Eng. L. & Eq. 41.

³ *Angell*, Ins. § 65. The learned author cites *Tidswell v. Ankerstein*, Peake, 151, and *Fletcher v. Commonwealth Ins. Co.*, 18 Pick. (Mass.) 419, neither of which seem to give the least support to the doctrine, or even to discuss the point in any way. The former merely decides that an executor has an insurable interest in the life of one who has granted an annuity to his testator, and the latter that a person having a house on the land of another, for which he pays rent under a verbal agreement, is not guilty of concealment in not stating this fact as to his title, not being interrogated thereupon. There is doubtless some mistake in the citation. And see *ante*, §§ 89, 90.

⁴ 41 L. J. N. S. C. P. 1.

⁵ *Ellicott v. United States Ins. Co.*, 8 Gill & Johns. (Md.) 166.

surety for the fidelity of an employé may insure against his default.¹

§ 98. **Reinsurance.** — The risk which one insurer has assumed with reference to any subject-matter of insurance, constitutes an insurable interest, which the insurer may protect, to the extent of his liability, by affecting an insurance in his own favor against the risk he has assumed. This procuring insurance to cover a risk already assumed is called reinsurance. The subject-matter of the insurance in each case is the same, but the interests are different. In the first case, the owner's interest is that which is protected; in the latter it is the insurer's interest in the preservation of the property by reason of the fact that he is under obligation to pay for it in case of loss. As the practice came to be a mode of speculating in the rise and fall of premiums, and there was danger that it might become a cover for wager policies, it was prohibited in England by statute,² except in certain cases.³ But it is a contract entirely within the general purposes and objects of insurance, and comes within the scope of the powers usually conferred by charters, and has, it is believed, been very generally, if not universally, England alone excepted, upheld.⁴

§ 99. **Copartner.** — A partner has an insurable interest to the amount of the value of the entire stock;⁵ and in a house purchased with partnership funds, but standing upon land of the other partner by his consent.⁶ Upon settlement of the joint account, the building must be treated as joint property, and his equitable interest in its preservation is an insurable one.⁷ When a partner retires from the firm, but no notice of a dissolution is given, and the firm name is used by the remaining partner, the retired but nominal partner has an insur-

¹ *Towle v. National Guardian Ins. Co.*, 5 L. T. N. S. 193; s. c. 30 L. J. C. 900; 7 Jur. N. S. 1109. See *post*, Chapter on Guarantee Insurance.

² 19 Geo. II. c. 27.

³ *Arnould*, Ins. 1, 287.

⁴ *New York Bowery Fire Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. (N. Y.) 359; *Eastern Railroad Co. v. Relief Fire Ins. Co.*, 98 Mass. 425. See also *ante*, §§ 9-12.

⁵ *Manhattan Ins. Co. v. Webster*, 57 Penn. St. (7 P. F. Smith) 227.

⁶ *Converse v. Citizens' Mut. Ins. Co.*, 10 Cush. (Mass.) 37.

⁷ *Ibid.* See also *Oakman v. Dorchester Mut. Fire Ins. Co.*, 98 Mass. 57.

able interest, so that insurance in the name of the firm is valid to the full amount. The legal interest is in the firm, though the beneficial interest is in the remaining partner.¹

§ 100. *Duration.* — In general, it is essential that the insured shall be possessed of an interest, both at the time when the insurance is effected and at the time of the loss;² and so strictly is this principle adhered to, that no recovery can be had even when by the terms of the policy the loss is payable to a third person, though that third person have at the time of the loss an interest in the property insured.³ And this doctrine was early applied to life as well as to marine and fire policies.⁴ But we shall see hereafter that, as to life policies, this doctrine has undergone some modification.

§ 101. *Continuity.* — It has also been said that the interest should remain an uninterrupted interest from the time of the insurance to the time of the loss, so that if the insured, at any time after the policy is taken out, parts with his title, though afterwards, and before the loss, he repurchase, yet the policy will not attach, and the insured will be without remedy.⁵ But in the absence of any condition against alienation which avoids the policy, it is not easy to see how the insurers can be prejudiced by such an interruption of title, since for so long a period at least as is occupied by the interruption they are without risk, and at no time do they incur any greater hazard than they agree to assume, whether we regard the property upon which the risk is taken or the person in behalf of whom it is taken. The insured has violated no stipulation of the contract, the insurer has not been prejudiced, and that there is nothing incompatible with the true principles of insurance in holding the insurer responsible after such an interruption, is shown by the familiar practice of insuring stocks in trade, under which the right of the insured to sell and repurchase

¹ *Phoenix Ins. Co. v. Hamilton*, Sup. Ct. U. S. 2 Ins. L. J. 130.

² *Lynch v. Dalzell*, 3 Bro. P. C. 497; *Saddlers' Co. v. Badcock*, 2 Atk. 534; s. c. 1 Wil. 10; *Howard v. Albany Ins. Co.*, 3 Denio (N. Y.), 301; *Fowler v. Indemnity Ins. Co.*, 26 N. Y. 422.

³ *Tallman v. Atlantic Fire and Mar. Ins. Co.*, 29 How. (N. Y. Pr. R.) 71.

⁴ *Godsal v. Baldero*, 9 East, 72.

⁵ *Cockerell v. Cincinnati Ins. Co.*, 16 Ohio, 148.

the same stock, or a substitute, cannot be questioned.¹ And in *Rex v. Insurance Companies*,² it was held that, when a mortgagee insured his interest, which was based upon present and contemplated advances to the mortgagor, and during the currency of the policy the earlier advances were repaid and new ones made, the policy was a valid security for such advances, within the amount insured, as remained unpaid at the time of the loss.³ And quite recently, in a case in Massachusetts, the case of *Cockerell v. Cincinnati Insurance Company* was cited in argument, and its doctrine insisted upon as the law. The facts were not such as to require a direct ruling on the point, but if they had been there can be no doubt that the court would have sustained the validity of the policy. The observations of the court in the case are so pertinent, and withal so weighty, that we make no apology for giving them in full. "But if it were otherwise," says Bigelow, C. J., who gave the opinion, "and it appeared that the sale of the vessel was complete and absolute, so that for a time the insured had parted with his insurable interest, his right to recover on the policy was not gone for ever. It was only suspended during the time that the title to the vessel was vested in the vendee, and was revived again on the reconveyance to the insured during the term specified in the policy. The insurance was for one year. There was no stipulation or condition in the policy that the insured should not convey or assign his interest in the vessel during this period. The contract of insurance was absolute, to insure the interest of a person named in a particular subject for a specified time; for this entire risk an adequate premium was paid, and the policy duly attached, because the assured at the inception of the risk had an insurable interest in the policy. So, too, at the time of the loss, all the facts necessary to establish a valid claim under the policy existed. The execution of the policy, the interest of the assured in the vessel, the due inception of the risk, a compli-

¹ *Lane v. Maine Mut. Fire Ins. Co.*, 3 Fairf. (Me.) 44; *Wood v. Rutland and Addison Mut. Fire Ins. Co.*, 31 Vt. (2 Shaw) 552.

² 2 Phila. (Penn.) 357.

³ See also 2 Am. Leading Cases, 463.

ance with all warranties, expressed and implied, and the loss by a peril insured against, are all either admitted or proved. Upon what legal ground, then, can it be maintained that the policy has become extinct? No fact is shown from which any inference can be made that by the alienation of the title to the vessel during the time named in the policy, the risk of the insurers upon the subsequent retransfer of the vessel to the assured was in any degree increased or affected, or that any loss, injury, or prejudice to the underwriter was occasioned by the fact that the absolute title to the vessel was temporarily vested in a third person. On the contrary, such temporary transfer of title would seem rather to have inured to the benefit of the insurers, because they have received a premium for a risk from which they were exempted during a portion of the time designated in the policy. In the absence of any express stipulation, as in the policy declared on, no return premium could be claimed by the assured by reason of any temporary suspension of the work or withdrawal of the subject insured. The policy had attached, and the risk was entire. During the time that the vessel was owned by a person other than the assured, no loss could happen which could be covered by the policy. The insured, having no interest, could sustain no loss. If a total loss occurred during the period, the insurable interest would become extinct. Upon a retransfer of title to the insured, the policy would revive only to secure the renewed interest thereby acquired, and not to render the insurers liable for losses which may have happened during the intermediate period. The sole effect would be to suspend the risk for the time during which, by reason of the transfer, the assured had no interest in the subject insured, and to revive it as soon as the original interest was revested in him. The transfer of the vessel rendered the policy inoperative and not void. It could have no effect while the insured had no interest in the subject insured. But when this interest was revived or restored during the time designated in the policy, without any increase or change of risk or other prejudice to the underwriter, there seems to be no valid reason for holding that the policy has become extinct. Inasmuch as neither the subject nor the per-

son insured is changed, and the risk remains the same, the intermediate transfer is an immaterial fact which can in no way affect the claim under the policy.

“ This doctrine is not only consistent with sound reason, but it is in accordance with the analogies of the law of marine insurance. Risks may be temporarily suspended, and subsequently revived, without invalidating the right of the assured to claim under the policy. Unseaworthiness, after the policy has attached, if imputable to the neglect or other fault of the assured, will suspend, but not destroy, the risk. Restoration of the navigability of the vessel will revive the right of the assured to claim under his policy.¹ So goods insured for a voyage which, by the terms of the policy are covered only when water-borne, may be withdrawn from the risk while temporarily placed on land, but the policy upon them will revive when, without increase of risk, they are again put on board the vessel. In these and like cases, the principle adopted is, that the contract of insurance is not violated, or the right of the assured to claim an indemnity affected, by the existence of a state of facts which does not contravene any stipulation in the policy, or in any way change or affect the risk, or otherwise work any injury or prejudice to the rights of the insurer.”²

So a violation of the conditions against over insurance or sale, and upon principle any like condition, non-existent at the time of the loss, does not work a forfeiture, but only a suspension of the insurance during the violation.³

§ 102. *Life*. — Within the present century it was made a serious question in one of the most learned courts of this

¹ *Taylor v. Lowell*, 3 Mass. 331; 1 Phil. Ins. § 734.

² *Worthington v. Bearse et al.*, 12 Allen (Mass.), 382. The learned judge cites also *Carroll v. Boston Mar. Ins. Co.*, 8 Mass. 515; *Power v. Ocean Ins. Co.*, 19 La. 28; *Howard v. Albany Ins. Co.*, 3 Denio (N. Y.), 301; 1 Phil. Ins. § 89. And see also *Hartford Prot. Ins. Co. v. Harmer*, 2 Ohio, N. S. 452; and *Hooper v. Hudson River Ins. Co.*, 16 Barb. (N. Y.) 413; s. c. affirmed in Court of Appeals, 17 N. Y. 424.

³ *New Eng. Fire and Mar. Ins. Co. v. Schettler*, 38 Ill. 166; *Obermeyer v. Globe Mut. Ins. Co.*, 43 Mo. 573; *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Penn. 402; *Powers v. Ocean Ins. Co.*, 19 La. 28; *Lane v. Maine Mut. Fire Ins. Co.*, 3 Fairf. (Me.) 44; *Morrison v. Tenn. Mar. and Fire Ins. Co.*, 18 Mo. 262.

country, in a case of novel impression, whether one person can have such an interest in the preservation of the life of another as to make it the valid basis of a contract of insurance. But, as upon well-settled principles of law all contracts, fairly made, upon a valuable consideration, which infringe no law, and are not repugnant to the general policy of the law, or to good morals, are valid and may be enforced, or damages recovered for the breach of them, it saw no reason to except the contract of insurance out of this general rule. Prior to this decision, the insurance of lives was prohibited in several of the countries of Europe, though it does not appear that the prohibition rested so much upon the absence of an interest to be protected, as upon some vague notion that it is indecorous to attempt to set a price upon the life of a man.¹

§ 103. **Sister in Life of Brother.** — But in this very early case the court not only found no difficulty in holding that one person may have an insurable interest in the life of another, but, in determining under what circumstances that interest may exist, laid down important principles which have since been generally approved, and led, and are leading, to a great enlargement of the catalogue of insurable interests. In that case the policy was effected by the plaintiff upon the life of her brother, who was about to embark on a voyage to South America, or elsewhere, from Boston. The insurance was for five thousand dollars for seven months, and the premium paid was one per cent per month. The plaintiff was a young female, without property, and had been supported and educated at the expense of the brother, who stood toward her *in loco parentis*. Nothing could show a stronger affection of a brother, said the court, for a sister, than that he should be willing to give a large sum to secure her against the contingency of his death, which would otherwise have left her in absolute want, and no one could hesitate to say that in the life of such a brother the sister had an interest. They were well satisfied that the interest of the plaintiff in that case, in the life of her brother, was of a nature to entitle her to insure it, observing that the interest of a child in the life of a parent, except the insurable one, which may

¹ Lord v. Dall, 12 Mass. 115. Decided in 1815.

result from the legal obligation of the parent to save the child from becoming an object of charity,¹ is as precarious as that of a sister in the life of an affectionate brother. For if the brother may withdraw all support, so may the father, except as above stated. And yet a policy effected by a child upon the life of a father, who depended upon some fund, terminable by his death, to support the child, would never be questioned, although much more should be secured than the legal interest which the child had in the protection of his father.

§ 104. **Father in Life of Son.**—As to what constitutes an insurable interest under a life policy we may observe, as has heretofore been observed with reference to fire insurances, that the tendency of the courts has been from strictness to liberality. It was early intimated, if not expressly held, that the interest must be a pecuniary interest, and therefore a father could not insure the life of his son. The value of the interest in such a case, said the court, is not a farthing.² The case was that of a minor son, upon whose arrival at his majority depended the vesting of a large sum of money under a settlement. The insurance was for two years, the minor being nineteen and a few months at the time the insurance was effected, and the object was to guard against the failure of the settlement to vest, in case of the death of the minor before his majority. As the money was to go to the son if he lived, doubtless the father had no direct pecuniary interest in that. The plaintiff pressed the point, however, on the ground that he had an interest in the services of his son, and upon the further ground that in case of need the son would be bound to support him. The court seemed to rely upon *Innes v. The Equitable Assurance Company*, cited by Mr. Justice Bayley as having been tried before Lord Kenyon,³ where the plaintiff, in

¹ The observation of Bayley, J., in *Halford v. Kymer*, that it was a matter of indifference to the father whether he was supported by the son or by the parish, entirely overlooked the ground of expectation arising out of affection and filial duty.

² *Halford v. Kymer*, 10 B. & C. 725.

³ This case is not reported, but it is referred to and stated most fully in *Lon. Law Mag.* 4, 373, where Lord Tenterden is reported to have said at the argument in *Halford v. Kymer*, that they could not give judgment for the plaintiff without flying in the teeth of the case tried by Lord Kenyon.

order to show an interest in the life of his daughter, offered a will by which he was to receive a certain sum of money contingent upon the life of his daughter. The will was proved to be a forgery, however, and apparently the defendants had a verdict on that ground. There was no discussion of the question whether an insurable interest existed on other grounds, but, as Lord Tenterden says, it was in effect admitted in that case that it was necessary to prove that the father had a pecuniary interest in the life of his daughter.

§ 105. But the law has been held differently in this country, and it has been determined that though a father, as such, may have no insurable interest, resulting merely from that relation, in the life of a child of full age, yet if that son is a minor of such age as to render valuable services, and to whom advances have been made, there can be no doubt of the father's insurable interest in his life. The father is entitled to the earnings of such child, and may maintain an action for their recovery. So he may maintain an action for the loss of his services if the child be injured. Hence he has a pecuniary interest which the law will protect and enforce.¹ Nor is it easy to see why, upon the principles laid down in *Lord v. Dall*, and stated in the plaintiff's argument in *Halford v. Kymer*,² by reason of the relationship and its attendant rights and obligations, an aged father, no longer capable of self-support, and actually supported by his son who has passed his majority, and who both by natural affection and by law is bound to contribute to his support, has not an insurable interest in the life of that son. It is precisely this natural affection, combined with the legal obligation to support, which, by universal consent, gives to the child an insurable interest in the life of the father. A son arrived at his majority may, in point of fact, have no need of his father's assistance, but the legal obligation of the parent to save the child from becoming an object of public charity gives to the child an insurable interest in the father. The same legal obligation of the child towards the father ought to give the father the like interest in the life of the child.

¹ *Mitchell v. Union Life Ins. Co.*, 45 Me. 104.

² 10 B. & C. 725.

§ 106. And to this extent the following comparatively recent case in Massachusetts would seem to go, though it was not necessary so to decide upon the facts in the case, which were as follows:—

On the second day of February, 1849, the plaintiff's intestate insured for seven years the amount of seven hundred dollars on the life of a minor son who was about to proceed to California, and who would become of age on the sixth day of the following January. The wages of the son had been taken by the father and appropriated to the support of the family. It was agreed between the son and a third person who had advanced him money with which to prosecute the enterprise that that third person should receive one-half his net earnings. To this agreement the father assented; he also provided an outfit for the son. The son died on board ship on the first day of December, 1849, soon after his arrival in California. It was objected that the father had no pecuniary interest at the time the policy was made, and no insurable interest at the time of his son's death. "We understand," said the court, "that the law of Connecticut, where the parties resided, is similar to that of Massachusetts, and that by the law of both States a father who supports, maintains, and educates a son under twenty-one years of age, and not emancipated, is entitled to the earnings of such son, and may maintain an action for them. Here, where the father had in terms relinquished his right to a share in the son's earnings for a valuable stipulation on the other side, designed and intended to increase those earnings, by a necessary implication he reserved his right to the other share of those earnings. According to any, the strictest, rule of construction, the assured, we think, had a direct and pecuniary interest in the life of the *cestui que vie*, his son. It is argued that the time which would remain after his probable arrival in California, before becoming of age, would be so short that his earnings, if any thing, would be very small. Supposing he was to have a passage of three or five months, he might still have five or six months to work in California; and this being a contract dealing with chances and probabilities, and even possibilities, and to be construed as such, it may well be sup-

posed that the parties had it in contemplation, that, by working a few weeks or days in a gold mine, or by a lucky hit in a single day, he might gain gold enough to make his share exceed the whole sum insured. But nearness or remoteness of this chance is immaterial; the parties regulate this matter for themselves, in fixing the sum to be insured and the rate of premium. It seems to us, therefore, that, according to the rule relied on by the defendants, the assured in the present case had a direct and pecuniary interest in the life of the son, sufficient to enable him to maintain this action.

But, upon broader and larger grounds, we are of opinion that, independently of the fact that the son was a minor, and the assured had a pecuniary interest in his earnings, the assured had an insurable interest sufficient to maintain this action.

The case in this State must be governed by the rules and principles of the common law, there being no regulation of the subject by statute; and the statute of 14 Geo. 3, c. 48, passed about the time of the commencement of the Revolution, never having been adopted in this State. All therefore which it seems necessary to show, in order to take the case out of the objection of being a wager policy, is that the insured has some interest in the life of the *cestui que vie*; that his temporal affairs, his just hopes, and well-grounded expectations of support, of patronage and advantage in life will be impaired; so that the real purpose is not a wager, but to secure such advantages, supposed to depend upon the life of another; such, we suppose, would be sufficient to prevent it from being regarded as a wager. Whatever may be the nature of such interest, and whatever the amount insured, it can work no injury to the insurers, because the premium is proportioned to the amount; and whether the insurance be to a large or small amount, the premium is computed to be a precise equivalent for the risk taken. Perhaps it would be difficult to lay down any general rule as to the nature and amount of interests which the assured must have. One thing may be taken as settled, that every man has an interest in his own life to any amount at which he chooses to value it, and may insure it accordingly.

We cannot doubt that a parent has an interest in the life of a child, and, *vice versa*, a child in the life of a parent; not merely on the ground of a provision of law that parents and grandparents, children and grandchildren, are bound to support their lineal kindred when they stand in need of relief, but upon considerations of strong morals and the force of natural affection between near kindred, operating often more efficaciously than those of positive law.¹

§ 107. Still it may not be safe to conclude from the cases just stated to the general propositions that a father may insure the life of any minor child, and that a sister may insure the life of any brother. In one case,² in reply to the objection that the policy was unsupported by any insurable interest, evidence was offered that the father had furnished supplies and money to his son who was about to proceed to California, and the fact of these advances seems to have been regarded by the court as a matter of significance. In another case,³ substantially the same facts existed, with the additional fact that the father had usually received the earnings of his son, and had specially reserved a portion of them during the currency of the policy. Upon this latter fact the court laid considerable stress, and held only that in that case the plaintiff had an insurable interest. In the third case,⁴ the court emphasize the fact that the sister had been supported and educated by the brother, and add that no one would hesitate to say that in the life of such a brother the sister had an interest. And afterwards,⁵ in speaking of *Lord v. Dall*, the same court say that that case held that the insurable interest might be inferred from particular circumstances. So that it is by no means certain that were the circumstances different, as, for instance, if the father were to insure for one year the life

¹ *Loomis, Adm'r v. Eagle Life and Health Ins. Co.*, 6 Gray (Mass.), 396. Opinion per Shaw, C. J. *Hoyt v. New York Life Ins. Co.*, 3 Bosw. (N. Y. Superior Ct.) 440; *Miller v. Eagle Life and Health Ins. Co.*, 2 E. D. Smith (N. Y. C. P.) 268.

² *Mitchell v. Union Life Ins. Co.*, 45 Me. 104.

³ *Loomis, Adm'r v. Eagle Life and Health Ins. Co.*, 6 Gray (Mass.), 396.

⁴ *Lord v. Dall*, 12 Mass. 115.

⁵ *Loomis, Adm'r v. Eagle Life and Health Ins. Co.*, *ubi sup.*

of an infant son, or if the son were to insure the life of a decrepit and pauper father, or a sister were to insure the life of a brother incapable or indisposed to assist her, there being in either case no well-founded expectation of pecuniary advantage from the continuance of the lives, or risk of loss from their termination, it may well be doubted if the courts would see in such circumstances any interest which would support a policy. The relationship, therefore, seems to be of little importance, except as tending to give rise to the circumstances which justify the expectation. Indeed, the doctrine of the latest of the Massachusetts cases before cited is broad enough to cover a case where there is no relationship at all, save one perhaps of mere friendship, if the circumstances are such as to show that the loss of the insured life will probably result in pecuniary disadvantage to the person procuring the insurance. Upon the whole, however, it yet remains to be decided whether mere relationship, with its attendant rights and obligations, as between father and son reciprocally, is a sufficient foundation upon which to rest an insurable interest. And in a still later case,¹ it is said that "the question, what is such an interest in the life of another as will support a contract of insurance upon the life, is one to which a complete and satisfactory answer, resting upon sound principles, can hardly yet be said to have been given;" and it is added that "as the premium is intended to be a precise equivalent for the risk taken, it would seem that the contract is a just and equitable one whether any interest in the life exists or not; and that the only essential inquiry is, whether the object of the contract is such as to obviate the objections to a mere wager upon the chances of human life."

Wife in Husband. — Of course, and for similar reasons, the wife has an insurable interest in the life of her husband. And it has been held that a divorce obtained at the instance of the wife, for whose benefit the life of the husband has been insured, will not deprive the wife, who has children and supports them, of a right to recover. The insurable interest remains sufficient to support the policy. Although divorced, the chil-

¹ *Forbes v. American Mut. Life Ins. Co.*, 15 Gray (Mass.), 249.

dren whom she is supporting may look to the father for support. That the care and custody of the children are decreed to her does not extinguish the obligation of the father to provide for them. And he also may be required by the court to contribute by way of alimony, or otherwise, to the support of his former wife.¹ And it seems that a woman living unlawfully with a man, as his wife, and treated and supported by him as such, has an insurable interest in his life.²

§ 108. **Creditor in Debtor.** — That a creditor has an insurable interest in the life of his debtor was adjudged in a very early case. The means by which the debt is to be satisfied may very materially depend upon the continuance of the life of the debtor, and at all events the death of the debtor must in all cases in some degree lessen the chances of payment.³ The point was made also in a very early case that, if the debtor was an infant who might interpose as against his creditor the plea of infancy, this contingency took the debt out of the category of insurable interests. But though the point was not decided, it was strongly intimated that the debt, till avoided, must be taken as the debt of an adult, as against a third person, since the debtor only could take the objection.⁴ The debt is not void, but only voidable, and if for necessities not even that.⁵ Upon the same principles, if the debt be one to which the Statute of Limitations might be pleaded at the time of the death of the debtor, it nevertheless constitutes an interest which will support a policy. The debt still exists. It is not extinguished by the currency of the statute, as in the case of payment. It may be revived by a new promise, and indeed without such promise, be enforced by action, unless the defence of the statute be interposed. The law does not presume that a new promise will be refused or the defence of the statute interposed.⁶ And there can be no doubt that the same would be

¹ *McKee v. Phoenix Ins. Co.*, 28 Mo. 383.

² *Equitable Life Assurance Soc. v. Patterson*, 41 Ga. 338.

³ *Anderson v. Edie, Park, Ins.* 432.

⁴ *Dwyer v. Edie, Park, Ins.* 432.

⁵ *Givens, Adm'r v. Rivers*, 5 Rich. Eq. (S. C.) 274.

⁶ *Rawls v. American Mut. Life Ins. Co.*, 27 N. Y. (13 Smith) 282, affirming s. c. 36 Barb. (N. Y.) 357. And see *post*, § 117 n.

the case, though the statute had run against the debt at the time of the insurance, and for the same reasons.

§ 109. The life of a debtor may be insured in two ways. The debtor may insure to an amount beyond the debt for the benefit of his creditor, and payable in case of loss to the creditor, in trust, first to pay the debt, and then to pay the balance to such parties as the debtor may designate;¹ or the creditor may insure the life of his debtor to the amount of the debt, payable to himself in case of loss. And the creditor may insure the life of one of two joint makers of a note, although the other be entirely able to pay the debt, and the estate of the insured be solvent; and he may recover the whole amount insured.² And if the creditor be a firm and the debtor be a firm, each member of the creditor firm has an insurable interest in the life of each member of the debtor firm.³

Partner in Copartners. — A case of some novelty in its facts has been before the courts of New York, recognizing an insurable interest in services agreed to be rendered. Three persons entered into a copartnership, two of them putting in the cash capital, and the third, who understood the business, putting in his skill as against the capital of the other two. And it was held that the two putting in their capital had an insurable interest in the life of the other, as his death would deprive them of his skill and services contributed to the common stock in lieu of cash capital.⁴

Interest in Future Earnings of the Insured under a Contract. — Somewhat analogous to the relation of debtor and creditor is that of a party who advances funds to another to enable him to prosecute an enterprise, under the agreement, that the party so advancing the funds shall be entitled in consideration therefor, to a portion of the profits of the enterprise accruing within a certain time. Here there is no debt, but only an obli-

¹ *American Life and Health Ins. Co. v. Robertshaw*, 26 Penn. (2 Casey) 189.

² *Morrell v. Trenton Mut. Life and Fire Ins. Co.*, 10 Cush. (Mass.) 282.

³ *Rawls v. American Life Ins. Co.*, 36 Barb. (N. Y.) 347; s. c. 27 N. Y. (13 Smith) 282.

⁴ *Valton v. National Loan Fund Life Assurance Soc.*, 22 Barb. (N. Y.) 9. The case subsequently went to the Court of Appeals (20 N. Y. 32), where the judgment of the court below was affirmed.

gation to pay over a portion of the profits earned within a certain period, if any shall be earned. This kind of contract was frequent in the early days of the Californian gold excitement, and it has been frequently held, that such a contract gave the party furnishing the advance and outfit, an insurable interest in the life of the person who was to prosecute the enterprise.¹ The amount of the insurable interest in such cases must be left to the determination of the parties. It does not depend at all upon the amount of advances and the cost of outfit. Of course the amount of earnings or profits which may be earned in such cases is wholly conjectural, and whatever the amount agreed upon by the parties in good faith may be, this will be taken to be the value of the interest in case of loss, as upon a valued policy, which the plaintiff will be entitled to recover. There seems to be no limit to the amount which may be fixed as the value of the loss. If the party effecting the insurance, under the influence of exaggerated expectations, is desirous to fix the prospective profits at a larger sum, and is willing to pay proportionably in the shape of premiums, there seems to be no reason why the insurers should not accept the obligation. It is the same thing to them, so far as the risk is concerned, whether they take a small risk or a large one, except that, if there is a profit on the small one, there will be a proportionably greater profit on the larger one.² It may be presumed, however, that, if the valuation should be fixed at so large a sum as to warrant the belief that the transaction was merely a cover and with intent to evade the law, the courts would hold such a policy void as a wager.³ If it be objected that such an interest is analogous to the case of expected profits, and that such are not insurable unless insured specifically, it is to be replied that an insurance

¹ *Bevin v. Connecticut Mut. Life Ins. Co.*, 23 Conn. 244; *Morrell v. Trenton Mut. Life and Fire Ins. Co.*, 10 Cush. (Mass.) 282; *Hoyt v. New York Life Ins. Co.*, 3 Bosw. (N. Y. Sup. Ct. 440; *Miller v. Eagle Life and Health Ins. Co.*, 2 E. D. Smith (N. Y. City C. P.), 168; *Trenton Mut. Life and Fire Ins. Co. v. Johnson*, 4 Zab. (N. J.) 577.

² *Ibid.*

³ *Miller v. Eagle Life and Health Ins. Co.*, 2 E. D. Smith (N. Y. C. P), 206. And see also *Wainwright v. Bland*, 1 Moody & Rob. 481.

upon a life is not an insurance of the life ; it is rather an insurance of the benefits to result to the insured from the continuance of the life. These are all that render the life valuable to him. No pecuniary value can be set upon the life as upon property. Life cannot be the subject of valuation and sale. Labor and services, or the proceeds thereof, may be. A wife recovers upon an insurance on her husband's life, in view of the benefits to result to her from the continuance of his life ; not because the life is of any value, irrespective of its devotion to her support and maintenance. A creditor recovers upon the death of his debtor, not because the life of the deceased was worth the amount of the debt, but because the expectation of payment of the debt is destroyed or impaired by the death. The insurance upon a life is, in itself, in the nature of an insurance upon profits. The very idea of a pecuniary interest in the life of another involves a claim, not to the life itself, but to some benefit resulting from or growing out of that life, and — except in the case of an annuity, derivable from some other source, but to endure only while the life shall continue — it involves also a claim upon the profits or proceeds accruing from the employment and efforts of the person whose life is the subject of the insurance. An insurance, therefore, upon the profits of a life specifically, would involve no idea that is not, from the necessity of the case, embraced in an insurance in terms upon the life itself.¹

Employes in Employer. — It is a very common thing in England for a clerk to insure the life of his master.² If the clerk has a contract for service for a number of years at an annual salary, he has an insurable interest in the life of his employers to the amount which will be payable to him for the unexpired portion of his term, provided he continue in the service.³ It so happened that in the last cited case the clerk stood in the relation of a debtor to his employer, and his employer having promised that while he lived the clerk should

¹ Per Woodruff, J., *Miller v. Eagle Life and Health Ins. Co.*, 2 E. D. Smith N. Y. C. P.), 268.

² Per Mellor, J., in *Hebdon v. West*, 3 Best & Smith, 578.

³ *Hebdon v. West*, 3 Best & Smith, 578.

not be called upon to pay, a policy of insurance on the life of the creditor was taken out by his debtor to the amount of the debt. But the court said that this interest in the life of the creditor was only an expectation that he would not call for the debt. It was a possibility of forbearance, an attempt to embrace the chance that the creditor would not do what he might do the day after the engagement was made, presenting a contingency not easily susceptible of pecuniary estimation, and they did not think that such a promise, without any consideration, or any circumstances to make it in any way binding, could be considered a pecuniary, or even an appreciable, interest.¹ So a master has an insurable interest in the life of a servant, to whose services he has a legal claim.²

§ 110. *Interest of Assignee.* — The general rule recognized by the courts is, that no one can have an insurance upon the life of another unless he has an interest in the continuance of the life. To hold otherwise would be contrary to the general policy of the law respecting insurance, in that it may lead to gambling or speculating contracts upon the chances of human life. And although when the contract between the insured and the insurers is expressed to be for the benefit of another, or is made payable to another than the representative of the insured, or an assignment to such other person is assented to by the insurers, the contract may be sustained; yet, if the assignee has no interest in the life of the subject of the insurance which would sustain a policy to himself, the assignment would only take effect as a designation, by mutual agreement of the contracting parties, of the person who should be entitled to receive the proceeds, when due, instead of the personal representatives of the insured. And if it should appear that the arrangement was a cover for a speculating risk, contravening the general policy of the law, it would not be sustained. The purpose of the clause in the policy, forbidding assignments without the assent of the company, is undoubtedly to guard against the increased risks of speculating insurance.

¹ *Hebdon v. West*, 3 Best & Smith, 578.

² *Miller v. Eagle Life and Health Ins. Co.*, 2 E. D. Smith (N. Y. City C. P.), 268.

The insurers are entitled to the full benefit of such a provision, as a matter of contract; and, as the policy of the law accords with its purpose, the court will not regard with favor any rights sought to be acquired in contravention of the provision.¹

§ 111. **Trustee.** — A peculiar case, involving the question of what constitutes an insurable interest, arose under the following circumstances: A., upon his marriage, gave a bond to secure £5,000 to his intended wife. Several years after the marriage, A. being in difficulties and unable to perform his bond, it was arranged that his wife should, out of her private income, keep up certain policies to be effected on A.'s life, in which he was to have no further interest than to carry out his bond. In pursuance of this arrangement A. insured his life by a policy, one of the conditions of which provided that policies effected by persons on their own lives, who should die by their own hands, shall be void so far as regards the executors or administrators of the person so dying, but should remain in force only to the extent of any *bonâ fide* interest acquired by any other person under an actual assignment by deed for a valuable consideration in money, or by virtue of any legal or equitable lien as a security for money, upon proof of the extent of such interest being given to the directors to their satisfaction. The policy, together with the bond for £5,000, was, immediately on its being effected, handed over to T., as a trustee for A.'s wife, in whose hands they always remained. A.'s wife paid the premiums upon the policy in pursuance of the arrangement. A. died by his own hands, and a claim was made upon the insurance office by his executors for the amount of the policy, which was resisted. But it was held that T. had a *bonâ fide* interest in the policy by virtue of an equitable lien as a security for money within the meaning of the condition, and that the executors of A. were therefore entitled to recover.²

§ 112. **Interest of Payee or Beneficiary.** — Whether, where a party effects an insurance on his own life, for the benefit of

¹ Stevens, *Adm'r v. Warren*, Adm'r, 101 Mass. 566.

² Moore v. Woolsey, 28 Eng. L. & Eq. 248.

another who pays the premiums, the policy is a valid one has been doubted, but the weight of authority seems to be in favor of the validity.¹ In *Forbes v. American Mutual Life Insurance Company*,² the insured took out a policy upon his own life payable to his sister's husband, paying the first premium himself, and the subsequent ones through the husband as his agent. The policy stipulated that "policies made payable to creditors or persons not belonging to the family of the person whose life is insured, are subject to proof of interest." The court were inclined to the opinion that even under these conditions the plaintiff would be entitled to recover, though the point was not decided, since it was not raised by the pleadings. It was only held that there was an interest to support the policy.³

§ 113. **Beneficiary's Name must Appear.**—So in England, under statute, 14 Geo. 3, c. 48, the name of the beneficiary must appear in the policy, as affirmed by the following case: The plaintiff married a wife who was a minor, and who was entitled to a legacy on arriving at her majority. The plaintiff asked the trustees to advance money in anticipation, to which they consented if A. would become surety. This A. consented to do if the plaintiff would insure his wife's life. At plaintiff's suggestion the wife insured her life in her own name, without mention that any one else had an interest in the policy. This was held void under the statute 14 Geo. 3, c. 48, which requires the name of the person interested in the policy, or for whose use or benefit, or on whose account the policy is taken out, as the purpose of the policy was to protect the surety. Although the wife might have an ultimate interest, the interest of the surety at the time of the insurance was clear, and it should have been so stated. And so also should the husband's name have appeared as a beneficiary.⁴

¹ *Wainwright v. Bland*, 1 Moo. & Rob. 481; s. c. 1 Mees. & Wels. 32; *Lord v. Dall*, 12 Mass. 115; *Hogle v. Guardian Life Ins. Co.*, 6 Robt. (N. Y.) 567; *Valton v. National Loan Fund Life Assurance Soc.*, 22 Barb. (N. Y.) 9; s. c. on Appeal, 20 N. Y. 32; *Rawls v. Amer. Mut. Life Ins. Co.*, 27 N. Y. 282.

² 15 Gray (Mass.), 249.

³ *Stevens v. Warren*, 101 Mass. 564.

⁴ *Evans, Adm'r v. Bignold*, 20 L. T. (N. S.) 659.

§ 114. **Life Policy generally a Valued Policy.** — A life policy is almost always a valued policy,¹ but not necessarily so. Thus *Bruce v. Garden*² was the case of an insurance by a creditor who had a running and constantly varying account with his debtor, to secure himself against loss of the balance which might at any time be due him. Of course in such a case the measure of damages is the amount which may be found to be due at the death of the debtor, a loss which is to be determined by proof as in other cases of open policies. There were several policies in this case amounting to much more than the offices paid. What was paid was the actual amount of the balance found due at the time of the decease.

§ 115. We have said that the general doctrine was, that in life as well as in fire and marine insurance there must be an interest at the time of the loss as well as at the time of insurance in order to support the policy.³ But more recently this subject has received a very careful consideration in the Exchequer Chamber, resulting in the conclusion that the doctrine for which *Godsall v. Boldero*⁴ has been constantly referred to as an authority — that there must be an insurable interest in the holder of the policy at the time of the loss as well as at the time of effecting the insurance — is not sound law, as applicable to life policies.⁵ The question in this case, it being admitted that the plaintiff had no interest at the time of the death, was upon the construction of the statute, 14 Geo. 3, c. 48; as, independently of the statute, there could be no doubt that a life policy, without any interest to support it, was a perfectly legal contract.⁶ And so it is to this day in Ireland where the statute, 14 Geo. 3, c. 48, has remained in force.⁷ “This contract,” said the court, per Parke, B.,

¹ *St. John v. Amer. Mut. Life Ins. Co.*, 2 Duer (N. Y. Superior Ct.), 419.

² 20 Law Times (N. S.), 1002; s. c. on appeal to the Lord Chancellor, 22 Law Times (N. S.), 595.

³ *Ante*, § 29.

⁴ 9 East, 72.

⁵ *Dalby v. India and London Life Assurance Co.*, 15 C. B. 365.

⁶ *Cousins v. Nantes*, 3 Taunt. 513; *Lucena v. Crawford*, 2 N. R. 269.

⁷ *British Ins. Co. v. Magee, Cooke and Alcock*, 182. The law is otherwise in this country. See *Ruse v. Mut. Benefit Life Ins. Co.*, 23 N. Y. (9 Smith) 516. As this statute is frequently referred to in the reports, it may be conven-

after holding the case under advisement, "is good at common law, and certainly not avoided by the first section of the 14 Geo. 3, c. 48. This section, it is to be observed, does not provide for any particular amount of interest. According to it, if there was any interest, however small, the policy would not be avoided. The question arises on the third clause. It is as follows: And be it further enacted, that, in all cases where the insured *hath* interest in the life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers, than the amount or value of the interest of the assured in such life or lives, or other event or events. Now what is the meaning of this provision? On the part of the plaintiff it is said it means only, that, in all cases in which the party insuring has an interest when he effects the policy, his right to recover and receive is to be limited to that amount; otherwise under color of a small interest, a wagering policy might be made to a large amount,—as it might if the first clause stood alone. The right to recover, therefore, is limited to the amount of the interest *at the time of effecting* the policy. Upon that value, the assured must have the amount of premium calculated; if he states it truly, no difficulty can occur; he pays in the annuity for life the fair value of the sum payable to have it in full. It is accordingly here subjoined. Statute 14 Geo. 3, c. 48, enacts:—

First, "That no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatever, wherein the person or persons, for whose use or benefit, or on whose account, such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every insurance made contrary to the true intent and meaning of this act shall be null and void to all intents and purposes whatsoever."

Second, "That it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies, the name or names of the person or persons interested therein, or for what use, benefit, or on whose account such policy is so made or underwrote."

Third, "That in all cases where the insured hath an interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers, than the amount or value of the interest of the insured in such life or lives, or other event or events."

The fourth section contains a proviso that this act shall not extend to insurances *bonâ fide* made on ships or goods.

able at death. If he misrepresents, by overstating the value of the interest, it is his own fault in paying more in the way of annuity than he ought ; and he can recover only the true value of the interest in respect of which he effected the policy ; but that value he *can* recover. Thus, the liability of the assurer becomes constant and uniform, to pay an unvarying sum on the death of the *cestui que vie*, in consideration of an unvarying and uniform premium paid by the assured. The bargain is fixed, as to the amount, on both sides.

“ This construction is effected by reading the word ‘hath’ as referring to the time of effecting the policy. By the first section the assured is prohibited from effecting an insurance on a life or on an event wherein he ‘shall have’ no interest ; that is, at the time of assuring. And then the third section requires that he shall cover only the interest that he ‘hath.’ If he has an interest when the policy is made, he is not wagering or gaming, and the prohibition of the statute does not apply to his case. Had the third section provided that no more than the amount or value of the interest should be *insured*, a question might have been raised, whether, if the insurance had been for a larger amount, the whole would not have been void ; but the prohibition to recover or receive more than that amount obviates any difficulty on that head.

“ On the other hand the defendants contend that the meaning of this claim is, that the assured shall recover no more than the value of the interest which he has at the time of the recovery, or receive more than its value at the time of the receipt.

“ The words must be altered materially, to limit the sum to be recovered to the value *at the time of the death*, or (if payable at a time after death) when the cause of action accrues. But there is the most serious objection to any of these constructions. It is, that the written contract, which, for the reasons given before, is not a wagering contract, but a valid one, permitted by the statute, and very clear in its language, is by this mode of construction completely altered in its terms and effect. It is no longer a contract to pay a certain sum as the value of the then existing interest, in the event of death,

in consideration of a fixed annuity calculated with reference to that sum; but a contract to pay — contrary to its express words — a *varying* sum, according to the alteration of the value of that interest at the time of the death, or the accrual of the cause of action, or the terms of the verdict or execution; and yet the price or the premium to be paid is fixed, calculated on the original fixed value, and is unvarying; so that the assured is obliged to pay a certain premium every year, calculated on the value of his interest at the time of the policy, in order to have a right to recover an uncertain sum; viz., that which happens to be the value of the interest at the time of the death, or afterwards, or at the time of the verdict. He has not therefore a sum certain which he stipulated for and bought with a certain annuity; but it may be a much less sum, or even none at all.

“This seems to us so contrary to justice and fair dealing and common honesty, that this construction cannot, we think, be put upon this section. We should therefore have no hesitation if the question were *res integra*, in putting the much more reasonable construction on the statute, that if there is an interest at the time of the policy it is not a wagering policy, and that the true value of that interest may be recovered in exact conformity with the words of the contract itself.

“The only effect of the statute is to make the assured value his interest at its true amount when he makes the contract.”

The court then proceed to say that *Godsall v. Baldero* was founded upon a mistaken analogy, the language of Lord Mansfield in *Hamilton v. Mendes*,¹ upon which Lord Ellenborough relied, having reference to a marine policy which is in its terms a contract of indemnity only; that while it had been referred to in divers cases without calling it in question, and sometimes with approbation,² yet in none of these cases was it material to controvert the point in question; that in point of fact, in practice, it had been uniformly disregarded; and that

¹ 2 Burr. 1270.

² *Vide* *Barber v. Morris*, 1 M. & R. 62; *Humphrey v. Arabin*, 2 Lloyd & G. 318; *Henson v. Blackwell*, 4 Hare, 434, *cor.* Sir J. Wigram, V. C.; *Phillips v. Eastwood*, 1 Lloyd & G. (Cas. temp. Sugden) 281.

therefore they ought not to be bound by the authority of that case.¹

§ 116. The injustice of the decision in *Godsall v. Baldero*² was so manifest, that it is not to be wondered at that the insurance companies refused to avail themselves of its proffered shelter, and that it became practically a dead letter. But the error was not that it proceeded on a mistaken analogy, and treated the contract under consideration like contracts in marine and fire insurance, as a contract of indemnity, but rather in a mistaken application of the principle. The court erroneously assumed that if the debt which constituted the insurable interest was paid, after the death of the debtor and before action brought, the creditor was indemnified. This was indeed true so far as the original debt was concerned; but it was not at all true so far as the new debt contracted by the insurers to the insured was concerned. In contemplation of law, and by the understanding of the parties, the annual payments which the insured agreed to make were the equivalent, and a profit beside, of the total sum which the insurers agreed to pay at the death of the debtor. So that, although subsequently to that time, and before suit brought, the original debt was paid by the debtor's executor, yet, as the creditor had, in contemplation of law, and according to the understanding of the parties, and possibly in point of fact, in the mean time paid to the insurers sums of money which in the

¹ Professor De Morgan also (*Essay on Probabilities*, p. 244 *et seq.*; and see note appended to the case of *Dalby v. India and London Life Assurance Co.*, *ut sup.*) criticises the doctrine of *Godsall v. Baldero* with much force and piquancy, observing amongst other things that "the several principles on which the decision was founded, well carried out, as they say in Parliament, would require that the previous contracts of a man who becomes insane should be null and void; that the meat which a man buys for his dinner should be returnable to his butcher under the cost, if his friend should invite him in the mean time; and in the case before us, supposing that C. (the creditor) should have outlived the term, and his debt were paid as before, then B. (the assured) might have brought his action against the office for the return of the premiums; alleging that, as it turned out, the office would have been indemnified, and therefore should have been considered as having run no risk." See also *Law v. Indisputable Life Policy Co.*, 1 Jurist, n. s. 178, where Wood, V. C., accepts and applies the doctrine of *Dalby v. India and London Life Assurance Co.*

² 9 East, 72.

aggregate amounted to a sum equal to that which he received from the debtor, he would suffer a total loss unless the insurers should pay him the amount of the policy. In fact, upon the doctrine of indemnity merely, correctly applied, the insurers should have been held to pay. The effect of the decision was, moreover, to make a new contract; to wit, that the insurers would pay the insured the amount of the debt, if some one else did not, — obviously a totally different contract from that which was actually made, and one too in which the creditor must either lose the original debt, or if that was paid, then he must lose the amount which he had paid by way of premiums. Thus by the decision of the court the creditor could in no case be indemnified, but, on the contrary, in every case must be the loser. The contract was certainly for an indemnity in the beginning, and had it been enforced according to its terms it would have proved to be an indemnity in the end. This contract of insurance on the life of the debtor to protect the creditor is closely analogous to the mortgagee's insurance on the house of the debtor to protect his mortgage. In one case the creditor insures on the life, in the other, on the property, of the debtor. In each case the contract is a separate and distinct collateral contract which the insured has a right to make for his own benefit, and there seems to be no doubt that the mortgagee, whether he insures as general owner or as mortgagee, may recover the full amount insured, without prejudice to his mortgage debt, which, whether it be paid or unpaid, is a matter of no concern to the insurers.¹ If a mortgagee insure for a year the house of his debtor to secure a mortgage note payable in a year, and there happens a total loss within the period, he recovers his insurance and still holds his

¹ *King v. State Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 1; *Suffolk Fire Ins. Co. v. Boyden*, 9 Allen (Mass.), 123; *Concord Mut. Fire Ins. Co. v. Woodbury*, 45 Me. 447; *Clark v. Wilson*, 103 Mass. 221. And so the mortgagee may recover the whole amount of his insurance if the loss amounts to so much, although the property remaining after the fire is ample security for the debt, or be restored to its original value. *Rex v. Ins. Co.*, 2 Phila. Rep. 357; *Kernochan v. New York Bowery Fire Ins. Co.*, 2 Duer (N. Y. Superior Ct.), 1; s. c. affirmed, 17 N. Y. 428; *Motley v. Manfrs. Ins. Co.*, 29 Me. 337; *Foster et al. v. Equitable Mut. Fire Ins. Co.*, 2 Gray (Mass.), 226.

note. So if a creditor insures the life of his debtor for a year to secure a note payable in a year, and the death happens within the period, he gets his insurance and still holds the note. In each case there is indemnity as between the insurers and the mortgagee and creditor, though by reason of their relations with strangers to the insurers the mortgagee and creditor may make an actual profit in the end by collecting their respective notes. If the insurer contracts to indemnify in one case, so he does in the other; and neither is the loss a contract of indemnity because the insured by his relations with others may make the double transaction a profitable investment or speculation. A man insures his house for a term of years to protect his estate; and he insures his life for a term of years for the same reason. If the house be burned the estate is indemnified for the loss of property; and if the life be lost the estate is indemnified for the loss of faculties which produce property. In either case there is indemnity simply. In one case the amount of loss may or may not be open to proof. In the other the amount of loss is fixed by the valuation in the policy and the agreement of the parties. But it is none the less an indemnity because it is agreed on.¹ Mortgagees and creditors may claim indemnity of the insurers with whom they directly contract, though they may have chances to get something beyond that from others, and in this sense their contracts may, though not with strict accuracy, be said to be not contracts of indemnity merely. This, it is apprehended, is all that is intended by the court in the case of *Dalby v. India and London Life Assurance Company*.² That case decides only that as at common law the contract of life insurance may be supported without any insurable interest in the insured either at the inception of the contract or at the death of the life, and as under statute 14 Geo. III. c. 48, only an insurable interest is requisite at the inception of the contract, it is not necessary that the insured should have an insurable interest at the time of the death. In other words,

¹ *St. John v. American Mut. Life Ins. Co.*, 2 Duer (N. Y. Superior Ct.), 419; *ante*, § 7.

² *Ubi supra*.

under that statute, the contract is one of indemnity at its incipency, but by the common law, which is not affected by the statute, it need not be one of indemnity; that is, supported by an interest, at the time of the death.

§ 117. The courts of this country have, however, as we have seen,¹ almost without exception refused to adopt the doctrine of the English common law in support of policies without interest, and it remains to be seen whether they will so far modify the rule as to uphold a policy where the insured has an interest when the contract is made, but has none when the event happens upon which the policy becomes payable. That the insurable interest need not have uninterrupted continuity, but may revive after suspension, has before been adverted to.² In the Supreme Court of the United States³ it was recently said that the contract of life insurance was not one of mere indemnity, and that an insurable interest was only necessary at the inception of the contract. But the point decided was simply that that court would not exercise its equity power when there was an adequate remedy at law; and the cases referred to as supporting the *dictum*,⁴ with the exception of the English case, are not authorities, since in all of them, in point of fact, the interest existed at the time of the death as well as at the inception of the contract. There are *dicta*, however, in the New York and New Jersey cases referred to, as also in other cases,⁵ which would seem to support the view that a continuing interest in a life policy is not necessary.⁶ Upon the whole, it is not improbable that, when the point is distinctly taken, it will be held that when the contract at its

¹ *Ante*, § 75.

² *Ante*, § 101.

³ *Phoenix Mut. Life Ins. Co. of Hartford v. Bailey*, 13 Wall. (U. S.) 616.

⁴ *Dalby v. India and London Life Assurance Co.*, 15 C. B. 365; *Loomis v. Eagle Life and Health Ins. Co.*, 6 Gray (Mass.), 396; *Lord v. Dall*, 12 Mass. 114; *Trenton Life and Fire Ins. Co. v. Johnson*, 4 Zab. (N. J.) 576; *Rawls v. American Life Ins. Co.*, 36 Barb. (N. Y.) 357; s. c. 27 N. Y. 282.

⁵ *Valton v. National Loan Fund Life Assurance Co.*, 22 Barb. (N. Y.) 9; *St. John v. American Mut. Life Ins. Co.*, 13 N. Y. 31.

⁶ But see *contra*, *Mut. Life Ins. Co. v. Wager*, 27 Barb. 354; *Kennedy v. New York Life Ins. Co.*, 10 La. An. 309; dissenting opinion of Mr. Justice Lee; *Leonard v. Eagle Life and Health Ins. Co.*, 4 Liv. Law Mag., per Ch. Walworth as arbitrator.

inception is based upon a substantial interest, and is in good faith entered into for the protection of that interest, it is not objectionable as a wager contract, and may be enforced though the interest may have ceased at the time of the death. And this is the more probable, as, while such a rule will keep the door shut against mere gambling and speculation, it will tend to encourage what is now almost universally regarded as a provident contract, securing not only an indemnity in case of loss, but the means of presently increasing capital, and a not disadvantageous mode of investment. The conclusion is, upon all the authorities, that life insurance, like all other kinds of insurance, is a contract of indemnity; but that that form of the contract, in some of its phases, is not merely a contract of indemnity, but includes that with a possibility of something more.¹ It can never therefore properly be entered into except for the purpose of security or indemnity;² though the fact that the contract may, under certain circumstances, result as a profitable investment, does not vitiate it, if entered into in conformity to the principles which underlie it; and so far as it seeks any other object than indemnity for loss, it departs from the legitimate field of insurance and engrafts upon that contract a purpose foreign to its nature.

¹ Emmet, J., in *Rawls v. American Mut. Life Ins. Co.*, 27 N. Y. 282, dissented on the ground that, before the death of the debtor whose life was insured, the Statute of Limitations having run against the note which constituted the basis of insurable interest at the inception of the contract, the interest had ceased, and so the action could not be supported.

² *Ante*, § 2.

CHAPTER V.

OF INSURANCE AGENTS, THEIR POWERS AND DUTIES.

§ 118. *Agency.*—The contract of insurance is in many, perhaps, more recently, in most, cases made through the intervention of agents. This gives rise to a multitude of questions, the solution of which more properly belongs to a treatise on the law of agency. Some of these questions, however, are so intimately connected with the subject of insurance, having, so to speak, grown out of its peculiarities, as to require special notice in this connection.

All incorporated companies must necessarily act through agents, and their respective officers are specially appointed and clothed with powers, more or less specific, to facilitate the transaction of business. To these, in case of emergency, are added special or general agents, who at home and abroad exercise very extensive powers. What is the fair scope of the authority of these agents, now so numerous, to whom are intrusted the duties, partly or wholly, of soliciting risks, receiving and forwarding applications,—being supplied with blanks for that purpose,—receiving premiums and deposit notes, and delivering policies? This question has given rise to some of the most perplexing difficulties, and to a larger proportion, perhaps, than any other of the controversies in courts of law. And upon a superficial examination of the cases, there would seem to be an inextricable confusion, if not an irreconcilable contradiction of opinion. But upon a more careful examination there will almost always be found shades of difference in the facts and circumstances, upon which apparently opposite opinions are founded, sufficient to relieve them from the element of contradiction. Still, for the very reason that there is in so many cases in the midst of a general similarity a particular dissimilarity of circumstances, it is difficult,

not to say impossible, to embrace within any formula of words, rules that would be sound and reliable. It will doubtless be more satisfactory to state the questions which have arisen, and are likely to arise, with their judicial solution, under each particular head.

§ 119. And, first, in soliciting risks, with what powers is the agent clothed? Of course it must be desired and expected by the principal that the agent in this particular will use due diligence—the greater the better, if not unauthorized—in procuring risks and extending the business. This implies that something is to be said of the character, standing, and merits of the company, and of its desirability as a means of protection. To what extent is the principal to be bound by the statement of the agent in the discharge of this part of his duty? Not certainly for a little exaggerated eulogy, or a little extravagance of expression, in setting forth its attractions. This is permissible because it is expected, and no person of average intelligence can be deceived thereby. As in the case of vendor and vendee, the vendor is permitted to set forth the merits of the merchandise he offers to sell with some degree of coloring.

§ 120. **Application.**—But second, and most important of all, what is the extent of the agent's power with reference to the duty of receiving and forwarding the application? Can he to any extent, and if any, to what, bind the company by intervening and aiding in the filling up of the application? That he can so do, to some extent, there can be no reasonable doubt. He is appointed by the company to facilitate and promote their business. To this end he is furnished with the necessary blanks, which, after they are filled up, he is to forward to the company's office. Of course this filling up must be in such manner as to make the application fit for its purpose, and valid as the basis of the contract. The questions propounded therein are those upon which information is desired. These are often very numerous, and not unfrequently quite general and indefinite, and susceptible of being answered briefly and substantially, or with greater or less minuteness of detail. How briefly, and with what degree of minuteness, the appli-

cant may not know. The agent must be presumed to be clothed with the power to say when the question is satisfactorily answered, that is, with sufficient fulness. Or in answering some of the questions it may not be easy to state exactly what the true answer is upon the facts. Viewed in different lights, or from different stand-points, the same question upon the given facts may admit of different answers. Cannot the agent say for the company from which stand-point they shall be regarded, and, having become possessed of all the facts, may he not say which answer ought to be given? Is the building to be insured a shop or a store? All the facts being made known, and the answer being a matter of doubt, may not the agent, instead of incumbering the papers with a multitude of details, agree for the company that it is either, according as he thinks the facts show it to be. His experience ought to enable him to judge of the true answer, and whether the details ought to be set out better than the applicant, who wishes only to answer truly and is indifferent as to which answer shall be given. May he not without risk accede to that answer which the agent assures him will be the more proper and satisfactory? There must be, it would seem, an incidental power lodged in the agent, adequate to the explanation of the proper description of the property or interest to be insured, the meaning of the words and phrases used in the questions, and the application of answers to the subject-matter, so far as they may be necessary to perfect the instrument and render it fit for its purpose and promote the usefulness and efficiency of the agency. In short, the agent may do in this behalf what could be done at the home office, if the application were filled up there upon conference with the officers; and that the agent may have answered some questions differently from what they would have been answered there, does not make his act the less binding upon the company. The fair inference from the fact of appointment is, that the agent is a suitable person and conversant with his business. The applicant naturally and rightfully so looks upon him. It cannot be supposed that he is so restricted and tied down as to destroy his usefulness to the company; and yet if agents so appointed are not to be allowed

to say a word by way of information or explanation, when fairly and honestly attending to their appropriate business, which shall attach to the contract and bind the company, it is easy to see that dealing with an agent can be neither satisfactory nor safe; and insurance companies would at once find their business confined to the limited sphere of negotiations with those only to whom the home office is accessible,—a result which it is fair to assume from their history and mode of doing business they by no means desire.¹

It is, moreover, always worth while in considering the question of the extent of the authority of an agent to look to his relations to the company in point of place. If he is remote from his principal, and so situated that were he obliged to refer questions of doubt which arise within the general scope of the duties to which he is appointed, his usefulness and efficiency would be materially impaired by the consequent delay, it is fair to presume that a more liberal exercise of discretion is permissible to him than to an agent having the same general powers, but residing so near to his principal that reference may be practicable and consistent with the success of the agency.

§ 121. And, in the third place, what is the extent of the authority of such agents in the matter of the receipt of premiums, whether in money or in notes, &c.; and, in general, in binding the company by terms and conditions not known to them, except constructively, and by waiving terms and conditions stated in the policy, and subject to which alone, as a general rule, they are willing to assume, and do assume, the responsibilities of the contract.

With these few general observations, designed to direct attention to the various questions likely to arise, and perhaps to indicate to some extent what is conceived to be the spirit and drift of the law, we shall now proceed to call attention to the several causes which may serve to illustrate these suggestions.

§ 122. *Agent of Insured.*—The agent of the insured to effect insurance is to all intents and purposes regarded in the

¹ *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 465.

same light as the principal, and whatever he does pertaining to the matter in his charge will be deemed the act of his constituent. His concealment, or his representation, even of a fact not known to his principal, is imputable to the latter; so that when a negligent or fraudulent agent of one who applies for insurance intervenes between him and an innocent insurer, the party who employs the agent must bear the consequences of the neglect or fraud, upon the principle, so familiar in all courts of justice, that when one of two innocent persons must suffer by the fraud or negligence or unauthorized act of a third, he who clothed the third with power to deceive or injure must be the one. If either party must suffer by the act of the agent, it must be the party whose agent he is.¹ The rule seems to be less strict in cases of other contracts.²

§ 123. Persons referred to for information are agents only to a limited extent. They are authorized in behalf of their principal to answer interrogatories, whether verbal or written, so far as it is agreed that they shall be questioned, and the principal is responsible if such referee does not answer correctly, but the referee is not authorized to volunteer information not asked for; and if he does this the principal is not responsible.³

Reference to the surgeon's report for answers to interrogatories about the health of the applicant converts the report into answers as if by the applicant, and any misrepresentation or concealment there is as fatal as if by the applicant personally.⁴ It behooves however all referees, so far as authorized, to

¹ *Fitzherbert v. Mather*, 1 T. R. 12; *Nicoll v. American Ins. Co.*, 3 W. & M. (U. S. C. C.) 529; *Carpenter v. American Ins. Co.*, 1 Story (U. S. C. C.), 57; *Smith v. Empire Ins. Co.*, 25 Barb. (N. Y.) 497; *Gladstone v. King*, 1 M. & S. 35; *Lynch v. Dunsford*, 14 East, 394; *Draper v. Charter Oak Ins. Co.*, 2 Allen (Mass.), 569.

² *Cornfoot v. Fowke*, 18 L. J. N. S. (Exch.) 297. Lord Abinger, however, dissenting, in a very able opinion.

³ *Swete v. Fairlie*, 6 C. & P. 1, per *Ld. Denman*, C. J.; *Huckman v. Fernie*, 3 M. & W. 505; *Rawlins v. Desborough*, 2 M. & Rob. 228; *Everett v. Desborough*, 5 Bing. 503; *Maynard v. Rhodes*, 1 C. & P. 360; *Rose v. Star Ins. Co.*, 2 Irish Jur. O. S. 206. See also *Rawls v. American Mut. Life Ins. Co.*, 27 N. Y. 294.

⁴ *Smith v. Ætna Life Ins. Co.*, N. Y. Ct. of Appeals, 1872, 2 Ins. L. J. 116.

answer carefully all such general questions, as, for instance, whether there are any other circumstances which would affect the risk, or are important for the company to know, as may be put to them; and if the person interrogated is in doubt whether a particular fact known to him is material or important, it is safest to communicate it, as his principal will be responsible for whatever in fact may be found by the jury to be material, without regard to his judgment upon that point.¹ But in *Wheelton v. Hardisty*² it was held that, when the policy contains no express condition that the insured shall be held responsible for the misrepresentations or concealments of the "life" or the referee, and is made on a declaration that the insured believes the statements of the "life" and the referee to be true, they are not his agents, and he is only responsible for the truth of his statement as to his belief, and not for their fraudulent misstatements. In Scotland, however, the assured is bound by the statements of the "life."³

§ 124. An agent having general authority to insure the property of his principal has no authority to effect an insurance in a mutual company whereby he makes his principal an insurer of others.⁴ The agent employed to effect insurance, it scarcely need be said, is responsible to his principal for every negligence in the performance of his duties. That the undertaking was gratuitous is no defence, if it was actually entered upon;⁵ though perhaps the breach of a mere gratuitous promise to undertake would not be actionable: So is he for neglect to make reasonable efforts to insure when it is his duty to obtain insurance if he can;⁶ and effecting insurance with irresponsible parties has been held to be negligence.⁷ The measure of damages in such case is the amount which the irresponsible insurers ought to have paid.⁸

¹ *Lindenau v. Desborough*, 8 B. & C. 586; s. c. 3 M. & R. 45.

² 8 E. & B. 232.

³ *Forbes v. Ed. Life Assurance Co.*, 10 Ct. of Sess. Cas. 451.

⁴ *White v. Madison*, 26 N. Y. 117.

⁵ *Wallace v. Telfair*, 2 T. R. 188, n.; *Wilkinson v. Coverdale*, 1 Esp. 75.

⁶ *Smith v. Lascelles*, 2 T. R. 187; *Smith v. Cologan*, 2 T. R. 188, n. (a).

⁷ *Hunell v. Bullard*, 3 F. & S. 445.

⁸ *Smith v. Price*, 2 F. & F. 748.

§ 125. *Agent must be disinterested.* — It is, of course, elementary law that an agent must not be personally interested adversely to his principal, so that an agent for receiving applications ceases to be an agent so long as he acts in a matter in which his personal interest is concerned. If he applies for insurance on his own property, as to that property he is no agent of the company. He cannot, by the familiar rule of law, as agent represent antagonistic interests.¹ He cannot be the agent of both parties in the same transaction. If he so act, the contract may be avoided by either party.²

§ 126. *Agent's Authority, what it appears to be.* — The authority of an agent must be determined by the nature of his business. It cannot be limited by special private instructions, unless there is something in the nature of the business, or the circumstances of the case, to indicate that the agent is acting under such special instructions. The agent's act must appear to be an act in furtherance of the business of his principal. If he is known to have charge of a special branch of his principal's business, his powers can only be exercised in the prosecution of that branch. An agent to make contracts has larger powers than an agent to receive applications to be forwarded to his principal. Stock companies have larger powers than mutual companies. So with their agents. A general agent, in the strict legal sense, is one who has all the powers of his principal as to the business in which he is engaged, — an extent of authority not often conferred in insurance. In that business an agent is termed a general agent rather with reference to the geographical extent of his authority, in contradistinction to a local agent, who may have original powers, though exercising them within more restricted limits; and the general agent may appoint local and sub agents, which a local agent cannot.³ But there seems to be no very well defined distinction between the powers of general agents, local agents, and

¹ *Bentley v. Columbian Ins. Co.*, 17 N. Y. 421, affirming s. c. 19 Barb. (N. Y.) 595; *New York Central Ins. Co. v. National Protection Ins. Co.*, 4 Kern. (N. Y.) 85, reversing s. c. 20 Barb. (N. Y.) 468; *Utica Ins. Co. v. Toledo Ins. Co.*, 17 Barb. (N. Y.) 132.

² *Ibid.*

³ *Rossiter v. Trafalgar Ass. Assoc.*, 27 Beav. 377.

sub-agents, and therefore they may become, in any case, a question of fact for the jury.¹ A general agent of a foreign company, appointed under a statute, to receive service of process, except as to such matters as facilitate suits against the principal, has no larger powers than are conferred by the common law of agency.²

A person authorized to accept risks, to agree upon and settle the terms of insurance, and to carry them into effect by issuing and renewing policies, must be regarded as the general agent of the company.³

And the possession of blank policies and renewal receipts, signed by the president and secretary, is evidence of such general agency.⁴

Authority to do a particular act carries with it the authority to make available the ordinary means by which the act may be accomplished. If the president of an insurance company be authorized by the by-laws to "adjust and pay losses," he may indorse notes held by the company and deliver them in payment.⁵ And though by the charter or by-laws the powers of officers may be restricted, they may bind the company though they exceed their powers, especially if such excess is known and acquiesced in.⁶

A secretary, authorized to answer all "communications in behalf of the company," may bind the company by his admissions in such correspondence as to the sufficiency of a notice of loss.⁷ So authority to settle the terms upon which a change in the risk may be made carries with it the right to waive a forfeiture by reason of a change in the risk.⁸ So special authority to settle for a loss carries with it the right to extend the time limited by the conditions of the policy, within which

¹ *Markey v. Mut. Benefit Life Ins. Co.*, 103 Mass. 78; *Koelges v. Guard. Life Ins. Co.*, 10 Abb. N. S. 176.

² *Ibid.*

³ *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351.

⁴ *Carroll v. Charter Oak Ins. Co.*, 40 Barb. (N. Y.) 292.

⁵ *Baker v. Cotter*, 45 Me. 236.

⁶ *Ibid.*

⁷ *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 20.

⁸ *North Berwick Co. v. New England Fire and Mar. Ins. Co.*, 52 Me. 336.

the statement of the loss is to be made.¹ But authority to take applications and surveys, to receive premiums and give certificates of insurance, subject to the approval of the directors, does not give authority to make a contract not subject to such approval.² It is to be observed, however, that the decided inclination of the courts is to extend, rather than restrict, the power of agents as to all that they may say or do touching the contract.³

§ 127. **Agents of Stock and Mutual Companies.**—In general, it may be said that the agents and officers of companies organized with a capital stock divided into shares have greater powers in determining what shall be the terms of the contract and in waiving a compliance with its stipulations than those of companies organized on the mutual principle, in which the by-laws are made to fix and regulate, by the same stipulations in every policy, the rights of all the assured alike.⁴ And it will be seen as we proceed, that while some courts, as those of Massachusetts and New Jersey, with a view to promote the safety and efficiency of such companies, have confined the powers of the agents and officers of mutual insurance companies strictly within the limits marked out by their charters and by-laws as interpreted in the light of the purposes for which such companies were established, others, looking rather to the protection and safety of those who are dealing with such officers and agents, have shown a perhaps increasing inclination to give a liberal construction to those provisions of the charters and by-laws which tend to limit such powers.

§ 128. **May bind the Company by Parol Contract.**—It has been at length settled by numerous decisions, as we have already seen,⁵ that the officers of a company may make a valid contract of insurance even by parol, and may bind the company which they represent by an agreement to insure as effectually as by a policy issued in due form, even where the

¹ *Lycoming County Mut. Ins. Co. v. Schollenberger*, 44 Penn. St. 259.

² *Ins. Co. v. Johnson*, 23 Penn. St. 72.

³ *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222.

⁴ *Brewer v. Chelsea Mut. Fire Ins. Co.*, 14 Gray (Mass.), 203.

⁵ *Ante*, § 14 *et seq.*

charter of the company requires that every contract, bargain, policy, or other agreement shall be in writing, signed by the president, and sealed with the corporate seal. But the exercise of such powers will not bind the company unless clearly within the scope of the agent's authority and of the powers of the company. While a parol agreement to issue a policy would be valid, a merely collateral promise or representation which does not involve the execution of a policy would not be, as is shown by the following case. The plaintiff, through a broker, applied to the defendants for insurance to a definite amount, and was informed that it would be taken. The defendants subsequently sent to the broker their own policy for a part, and the policies of three other companies for the residue, executed by an agent for the latter companies. The broker on receiving the policies wrote, in the absence of his principals, to the defendants, to say that he doubted whether the three latter policies would be accepted, alleging as a reason that the agent had not a good reputation for settling losses, and adding, "I don't know whether it is your custom to guarantee the offices you insure in or not. If you do, I may prevail on" the plaintiff "to hold the policies." The secretary of the defendants, in reply, wrote: "In handing the policies" to the plaintiff, "you can say that, if the boat is not insured in offices satisfactory to him, we will have them cancelled; but, though they are not reinsurances, yet, in case of loss, we will feel ourselves bound for a satisfactory adjustment. We deem the companies good, and if any parties can settle with them, we can." On the faith of this letter the transaction was closed, and one of the substituted companies having failed, and a loss having occurred, a special action was brought against the defendants, which resulted unfavorably to the plaintiff, on the ground that such a contract was not within the scope of the secretary's authority, because not strictly within the scope of the powers granted to the corporation.¹

§ 129. **General Agent of Stock Company, pending Negotiations.**—The power of an agent of a stock company held out

¹ *Constant v. The Allegheny Ins. Co.*, 3 Wall. Jr. (U. S. C. C.); s. c. 1 Am. Law Reg. N. S. 116.

by the company to the public as such, and entrusted with policies in blank, signed by the president and secretary, and to be filled up, indorsed, countersigned, and issued by the agent, is plenary as to the amount and nature of the risk, the rate of premium, and generally as to the terms and conditions of the contract; and he may make such memoranda and indorsements modifying the general provisions of the policy, and even inconsistent therewith, as in his discretion seem proper, before the policy is delivered and accepted, or even after, if this be his habit known to the office.¹ Having the authority to make an original contract upon terms similar to those contained in the policies, signed in blank, entrusted to him, and being clothed with such general powers, he may before the delivery modify the terms and conditions so as to make the company liable for loss by special cause, from liability for which the general printed terms of the policy would exempt them, and allow the insured to keep articles, use modes of heating, and carry on branches of manufacture, prohibited by the printed terms of the policy, without risk of forfeiture. He may also insert by memorandum or indorsement a description of the property insured inconsistent with the description of the same contained in the application, and such change will be effectual to protect the insured, although the policy itself provides that all the conditions named in the survey or application are to be fully complied with, and such survey and description shall be deemed to be a part of the policy and a warranty on the part of the insured.² These acts of the agent, it is to be observed, are such as are done in the process of negotiation,³ and while the contract is yet incomplete. When once the contract is perfected, the power conferred by the agency as to this is in many respects exhausted.⁴ But the agent's powers to deal with facts and circumstances arising after the completion of the contract are by no means so extensive.⁵

¹ Gloucester Manuf. Co. v. Howard Fire Ins. Co., 5 Gray (Mass.), 498; Brockelbank v. Sugrue, 5 C. & P. 21.

² Ibid.

³ Post, § 144.

⁴ Healey v. Imperial Fire Ins. Co., 5 Nev. 268.

⁵ See post, §§ 131, 138.

§ 130. Authority to insure Property located beyond his District. — And such an agent authorized to effect insurance “for a particular city and its vicinity,” may nevertheless insure property located beyond the geographical limits of his agency, and within those of another agent. His private instructions cannot affect the relations between the insured and the insurers. Besides, it would seem that the restriction applied rather to the sphere within which the agent should act, than to the property which, while acting within prescribed limits, he might insure, although located beyond those limits.¹ And such an agent may also bind his principal, even though he act contrary to his instructions, if what he actually does is fairly deducible from his authority as general agent, the instructions which he violated not being known to the insured. And the delivery by such agent of a policy to which the insured is fairly entitled in execution of a subsisting agreement is good, although before its delivery the insurers notify the insured that they will not be bound by it, and that they have revoked the authority of the agent to act for them.² If such agent fails in his duty to his principal it is no fault of the insured.³ And any mistake of omission or commission made in the description of the property insured or otherwise, he having the means of knowing the truth, and not being misled by the insured, cannot be availed of by the company to the prejudice of the insured.⁴

§ 131. Upon the same ground, verbal notice to the agent that gunpowder is at the time of insurance, and will thereafter, be kept on the premises for sale, is notice to the company; and if after such notice a policy be issued containing a provision that if gunpowder is so kept, without written permission in the policy, the policy shall be void, it is a waiver of the condition.⁵ Though it was said in the same case that the

¹ *Lightbody v. North American Ins. Co.*, 23 Wend. (N. Y.) 18.

² *Ibid.*; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517.

³ *Gloucester Manuf. Co. v. Howard Fire Ins. Co.*, 5 Gray (Mass.), 497.

⁴ *Ayers v. Home Ins. Co.*, 21 Iowa, 185; *Emery v. Piscataqua Fire and Mar. Ins. Co.*, 52 Me. 322; *New England Fire and Mar. Ins. Co. v. Schettler*, 38 Ill. 166.

⁵ *Peoria Mar. and Fire Ins. Co. v. Hall*, 12 Mich. 202.

agent cannot give a partner who insures the partnership property in his own name only, under the belief, induced by the expressed opinion of the agent to that effect, that such insurance would cover the copartnership interest, a specific article of property, a claim against the company for more than his own interest, as his opinion as to the legal effect of the contract does not bind the company ;¹ it has been distinctly held to the contrary in recent well-considered cases in Pennsylvania,² and in Illinois.³ If, however, one party who owns a building joins with another party who owns the personal property within the building, in an application, which is filled up and forwarded by the agent of the company, to whom all the facts are known, and a policy is issued purporting to insure the parties as joint owners of the real and personal estate, the insurers will be estopped to deny that the title is a joint one.⁴ So, if the general agent makes a mistake as to the character of the insurable interest of the applicant, the facts being correctly stated to him, and sets it down as an absolute, instead of a qualified, interest, which it really is, the company is estopped to deny that the interest is truly stated.⁵ So if the agent express the opinion that certain outstanding judgments do not amount to an incumbrance, this error of opinion will be imputable to the company ; and a statement that there is no incumbrance will not avoid the policy, notwithstanding the policy provides that if the agent of the company assumes to violate any of its conditions, such violation shall be construed to be the act of the insured and shall render void the policy. "If," such is the vigorous language of Mr. Chief Justice Woodward, "the agent returned that there were no incumbrances when he had been informed that there were judgments and a lease, he may have violated the 'conditions,' but no company has a right to select and send out agents to solicit patronage and business for its benefit, and then to saddle their

¹ *Peoria Mar. and Fire Ins. Co. v. Hall*, 12 Mich. 202.

² *Manhattan Ins. Co. v. Webster*, 9 P. F. Smith (Penn.), 227.

³ *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 222.

⁴ *Peck v. New London Co. Mut. Fire Ins. Co.*, 22 Conn. 575.

⁵ *Atlantic Ins. Co. v. Wright*, 22 Ill. 462.

blunders upon its customers. If the assured combine with the agent to cheat the company, we protect the company;¹ but if the assured has covenanted for nothing, and has been guilty of no misrepresentation, concealment, or fraud, the company had better pay his loss, than to attempt to make him responsible for the blunders of their agent.”² And to the suggestion that, the insured being a member of a mutual insurance company, the agent was his agent, the learned judge replied: “The charters of these mutual companies do make the assured members, but I take it membership does not begin till the contract is complete and the policy issued. As to all preliminary negotiations, the agent acts only on behalf of the company.”³ So if the agent express the opinion that an accidental omission of which he is informed will make no difference.⁴

§ 132. **Agent's Knowledge, Knowledge of Principal.**—Facts material to the risk, made known to the agent before the policy is issued, are constructively known to the company, and cannot be set up to defeat a recovery on the policy.⁵ So the issue of a policy, after verbal notice to the agent of an existing incumbrance, is a waiver of the written notice required by the terms of the contract.⁶ And it has even been held that the knowledge by an agent of the assignment of a policy, prior to the declaration of bankruptcy, is notice to the company sufficient to prevent the policy from passing to the assignee in bankruptcy.⁷ But consent of an agent for securing applications to an assignment will not bind the company, when the very form of the assignment on the policy implies that it requires the consent of an officer of the company.⁸ And

¹ Referring to *Smith v. Ins. Co.*, *post*, § 149.

² *Columbian Ins. Co. v. Cooper*, 50 Penn. St. 331.

³ *Ibid*.

⁴ *Fire and Mar. Ins. Co. v. Chesnut*, 50 Ill. 111.

⁵ *People's Ins. Co. v. Spencer*, 53 Penn. St. 353; *Liddle v. Market Fire Ins. Co.*, 4 Bosw. (N. Y.) 179; *Beal v. Park Ins. Co.*, 16 Wis. 241; *Kelley v. Troy Fire Ins. Co.*, 3 Wis. 254; *Hough v. City Fire Ins. Co.*, 29 Conn. 10; *Keenun v. Mo. State Mut. Ins. Co.*, 12 Iowa, 126; *Combs v. Hannibal Savings and Ins. Co.*, 43 Mo. 148; *Plumb v. Cattaraugus Mut. Ins. Co.*, 18 N. Y. 392; *post*, § 152.

⁶ *Ames v. N. Y. Union Ins. Co.*, 14 N. Y. (4 Kern.) 253.

⁷ *Gale v. Lewis*, 16 L. J. N. S. (Q. B.) 119.

⁸ *Stringham v. St. Nicholas Ins. Co.*, 3 Keyes (N. Y.), 280.

especially will the agent bind the company, if the applicant be compelled by the rules of the company, either to apply to the agent to make the survey, or to make it himself, strictly in accordance with certain requirements, and the agent is so applied to;¹ or if the company depends upon its own knowledge of the facts furnished by its agent after a personal examination.²

§ 133. **Representations of Agent.**—The agent of a stock company, appointed under its by-laws to solicit risks, receive and transmit applications, receive back and deliver policies, and receive notes for the premiums on marine risks, and cash for those on fire risks, whose services are paid for by the company by a commission on the premiums received by him, and who is specially authorized by the president and secretary to state to applicants for insurance, who inquire upon the subject, that the capital of the company is all paid in and invested according to law, may also bind the company by his representations as to the condition of the company and its ability to fulfil its contracts.³

And it seems that the local agent of a mutual company is presumed to be authorized to make answers to inquiries as to the standing, pecuniary or otherwise, of the company he represents,⁴ though not as to the territorial limits within which the company takes risks,⁵ unless the assured has notice that the company will not be bound by any such statements, or other statements not contained in the application.⁶ But not every such statement will bind the company. Thus an agent appointed to “transact business” for the insurers, “and for those who are insured or make application to be insured” by them, has no authority to bind the company by a promise that the insured

¹ *Roth v. City Ins. Co.*, 6 McLean (U. S. C. Ct.), 324.

² *Cumberland Valley Mut. Prot. Ins. Co. v. Schell*, 29 Penn. 31; *Com. Ins. Co. v. Ives*, Sup. Ct. Ill. 1871; 1 Ins. L. J. 822.

³ *Fogg et al. v. Griffin et al.*, 2 Allen (Mass.), 1; *Williams et al. v. Pew*, ib.; *Jones v. Dana*, 24 Barb. (N. Y.) 395.

⁴ *Devendorf v. Beardsley*, 23 Barb. (N. Y.) 656.

⁵ *Hackney v. Alleghany Co. Mut. Ins. Co.*, 4 Barr (Penn.), 185; *post*, § 148.

⁶ *Shawmut Mut. Fire Ins. Co. v. Stevens*, 9 Allen (Mass.), 332; *Chase v. Hamilton Mut. Ins. Co.*, 20 N. Y. 52.

shall not be called upon to pay any assessment on his premium note; nor will his highly colored statements as to the actual pecuniary condition and future prospects of the company, not absolutely and materially fraudulent, but allowable within the fair range of embellishment and chaffer in the matter of bargain, vitiate the policy which the insured has been induced to accept under such promises and representations, unless calculated in the opinion of the jury to impose upon a careful and prudent man. If the representations are of such a character that they would vitiate other contracts, they will vitiate the contract of insurance, not otherwise. The stringent rules applied to misrepresentations by the insured in obtaining insurance, apply only to statements materially affecting the risk, and do not apply to the misrepresentations of the insurers in procuring parties to insure.¹ In this case a reluctant and hesitating defendant was told by the agent that the company had a great sum of money in its treasury, enough to pay all the losses for five years; that if he would pay five dollars that would be all he would have to pay; and that there would be a dividend among those insured at the end of five years. He was thus induced to pay the five dollars and take the policy. Instead of the dividend came a series of assessments, which he resisted on the ground that the policy was void by reason of the misrepresentations whereby he was induced to accept it. Some observations of the learned judge, Redfield, C. J., are worthy of a place here.

“To what extent the agent’s representations, in effecting insurances, will bind the company, is a question of more difficulty. For although he is undoubtedly a general agent for transacting a particular department of the business of the company, in a limited district, still his power to bind the company is certainly not unlimited. The authority of a general agent is restricted to the range of his employment and the acts and representations which a prudent and ordinarily sagacious and experienced person might expect him to do, or to be authorized to make, on behalf of his principal. The representation claimed in the present case was a remarkable one, and one not very

¹ Farmers’ Mut. Fire Ins. Co. v. Marshall, 29 Vt. 23.

well calculated to impose upon men much experienced in the manner of transacting the business of such companies. But so large a proportion of the people, especially in the remote rural districts of the State, are almost wholly ignorant upon these points, and are, in consequence, so readily made the victims of interested solicitors on behalf of the numerous insurance companies, who are found, I believe, always ready and urgent to insure one against all the calamities of life, that courts ought not, perhaps, to require any very rigid rules of circumspection in these matters from wholly inexperienced persons. It seems to us altogether a question of fact, whether a given representation was really calculated to impose upon a careful and prudent man. And in a case where that question should become important it would be proper, when raised by counsel, to submit it to the jury.

“But it seems to us that the representation of the agent in this case or stipulation, if we so consider it, is not of the class which will avoid the policy, if it would not equally avoid a written contract upon any other subject. It is undoubtedly true that, in regard to representations and concealments affecting materially the risk, both in marine and fire insurance, policies may be avoided, when in other contracts such representations certainly would not have that effect. The law of insurance has been regarded as specially requiring the utmost good faith. Hence all representations inserted in the policy, or contained in the application, and expressly referred to in the policy, as part of it, are denominated warranties, and must be strictly complied with or the policy is avoided. And in regard to representations and concealments which are material, and directly affect the risk, whether on the part of the assured or the insurer, unless the representations are substantially true, the policy is void, although such representations are merely by parol, and made at and before the time of effecting the insurance, and not inserted in the policy; they being regarded as substantial fraud in regard to a policy of insurance, while in regard to ordinary contracts similar representations would perhaps be held as within the fair range of allowable embellishment and chaffer in the matter of bargain;

or, if in the nature of express warranties, would be held to have been waived, by not being inserted in the written contract."

And in Pennsylvania it has been held, that the agents of a mutual insurance company cannot prejudice the rights of the company by misrepresentations as to the places where risks were located; as that the company did not take risks in cities.¹

§ 134. **Authority in the Matter of Premiums.**—Where the agent is authorized to accept the payment of premiums, he may exercise his discretion as to the mode of payment. He may, for instance, accept a check, instead of the money;² or Confederate States notes, while the notes had a value, and the government had a *de facto* existence;³ or, if a check is offered, his request to let the money lie, coupled with a promise to call for it when he wants it, will amount to a waiver of the condition that the premium shall be paid before the insurance shall become binding.⁴ And the same is true whether a check is offered or not.⁵ So, if the agent requests the insured to keep the money till the policy arrives,⁶ or agrees to be himself responsible to the company for the premium, accepting the insured as his personal debtor for the amount, or encourages delay.⁷

§ 135. And upon a receipt for the premium and the actual payment thereof to the local agent, authorized by the company to make insurances binding upon them from the date of the payment to him, provided they should approve the rate of premium charged and be otherwise satisfied with the risk, it

¹ Hackney v. Alleghany Mut. Ins. Co., 4 Barr (Penn.), 185; *post*, § 148.

² Tayloe v. Merchants' Fire Ins. Co., 9 How. (U. S.) 390.

³ Robinson v. International Life Assurance Soc., 42 N. Y. (3 Hand) 54.

⁴ New York Central Ins. Co. v. National Protection Ins. Co., 20 Barb. (N. Y.) 468; Bodine v. Exchange Fire Ins. Co., 2 Ins. L. J. 23.

⁵ Goit v. National Prot. Ins. Co., 25 Barb. (N. Y.) 189.

⁶ Hallock v. Commercial Ins. Co., 2 Dutch. (N. J.) 268.

⁷ Sheldon v. Conn. Mut. Life Ins. Co., 25 Conn. 207; Bouton v. American Mut. Life Ins. Co., 25 Conn. 542; Post v. Aetna Ins. Co., 43 Barb. (N. Y.) 351. But *contra*, Bellville Mut. Ins. Co. v. Van Winkle, 1 Beasley (N. J.), 333; Catoir v. Am. Life Ins. and Trust Co., 33 N. J. (4 Vroom) 487. In Wall v. Home Ins. Co., 8 Bosw. (N. Y. Superior Ct.) 597, it was held that an agent for issuing policies and receiving premiums could not waive a forfeiture for non-payment of premium.

appearing that the rate charged was the usual one for that class of risks, a bill in equity for relief, the company having heard of the loss and refused to issue a policy, was sustained on the ground that the company could not be permitted to repudiate the contract of their agent, and arbitrarily refuse the risk because a loss had intervened. The neglect of the agent to forward the premium is imputable to the company.¹

So where an agreement was made with an insurance company's agent for insurance, and a receipt taken by the insured for the premium, which however was not then paid, stating that the insurance would take effect on the day of its date. Ten days afterwards the property was burned, and on the following day the insured, without disclosing the fact of the fire, paid the premium to the agent, who, in ignorance of the fact of loss, forwarded the application to the company, together with the premium. A policy was returned in due form to the agent, who, having meanwhile heard of the loss, declined to deliver the policy, and tendered back the premium. In an action setting forth the above facts, the plaintiff was held entitled to damages for the loss sustained, the contract being complete when the policy was forwarded to the agent, and taking effect from the date of the receipt.² So such an agent may give permission to the insured to remove the property insured to another locality.³

§ 136. **May waive Forfeiture by Receipt of Premium.**— In an action upon a life policy it appeared that the insured had by taking up his residence abroad violated a provision of the policy which made it void if the assured without license from the insurers should go beyond the limits of Europe. The insured, however, notified the local agent of the insurers, at the place where he effected the insurance originally, of his change of residence, and asked before he paid any further premiums if such change would vitiate his policy, to which the agent replied that it would not if the premiums were regularly paid. There-

¹ Perkins v. Washington Ins. Co., 4 Cowen (N. Y.), 645, reversing s. c. 6 Johns. Ch. (N. Y.) 485.

² Whittaker v. Farmers' Union Fire Ins. Co., 29 Barb. (N. Y.) 319.

³ New England Fire and Mar. Ins. Co. v. Schettler, 33 Ill. 166.

upon the premiums were paid, and continued to be paid regularly for several years to the local agent and his successor, who had knowledge of the facts; but neither of the agents informed their principal of the change of residence, though regularly forwarding the premiums as received. It was contended that the agent was acting beyond the scope of his authority in assuring the insured that such change of residence would not invalidate the policy, if the premiums continued to be paid, and that the notice of the change to the agents was not notice to their principal. But the court said that the party paid and the agent received the premiums upon the faith and condition that the policy was to be considered valid and subsisting; that as the agents were duly constituted for the purpose of receiving premiums as well as for other purposes, it was their duty, and not that of the insured, to communicate to the home office the circumstances under which these premiums had been paid, and the representations, terms, and conditions under which they were paid; that the insurers must be deemed to have constructive notice of the change of residence, and that upon the payment and receipt of the premiums by them they became as much bound as if the premiums had been paid directly at the home office, and had been received there with a full knowledge of the change of residence of the insured.¹ In *Acie v. Fernie*,² it was held that an agent to collect premiums could not, by accepting a premium after forfeiture of the policy for non-payment, bind the company so as to waive the forfeiture, although the company had charged the agent with the amount of the premium on account, in accordance with an understanding that this should be done at the expiration of fifteen days after the premium became due. But the weight of authority seems to be the other way.³

§ 137. Limitation of Agent's Authority by Terms of Policy. —

¹ *Wing v. Harvey*, 27 Eng. L. & Eq. 141. See also *Miner v. Phoenix Ins. Co.*, 27 Wis. 693; *Supple v. Cann*, 9 Irish Law, n. s. 1265; *Gloucester Manuf. Co. v. Howard Fire Ins. Co.*, 5 Gray (Mass.), 497; *Hodsdon v. Guard. Life Ins. Co.*, 97 Mass. 144; *North Berwick Co. v. N. E. Fire and Mar. Ins. Co.*, 52 Me. 336.

² 2 Mees. & Wels. 151.

³ *Ante*, §§ 134, 135.

Of course if the insured stipulate in his application that the insurer shall not be bound by any act done or statement made to or by the agent, not contained in the application, he cannot shelter himself under a plea of equitable estoppel, by reason of the agent's fraud or negligence. The knowledge by the agent of a fact not stated in the application in that case becomes entirely immaterial, unless possibly when the statement of the fact may have been fraudulently prevented by the agent.¹ And equally, of course, such a general agent has no power to bind the company in a case where, had all the facts transpired without the intervention of an agent, the company would not be bound. Thus, where a proposal was received on the morning after a fire, information of which reached the agent in the afternoon, who on the following day countersigned and delivered a policy, it was held that the policy was invalid, as there was no contract to insure prior to the loss, the proposal not then having been accepted nor even received.² Nor can such an agent make a contract, in which he himself has an interest, valid against the company;³ nor, where he assigns his own policy, accept notice of the assignment.⁴ And as there is no legal presumption that offices clothe their agents with power to fix the terms of, or perfect the contract, and as the question of the agents' authority is always one of fact, it is always advisable in treating with them to resolve all doubts as to their powers against their authority. A company may even allow its agent to advertise his office as a "branch office;" yet if the application shows that the policy is to be issued at the home office, and the premium is to be paid when the policy is presented to the applicant, a receipt for the premium, signed by the agent, and delivered when the application is forwarded

¹ *Shawmut Mut. Fire Ins. Co. v. Stevens*, 9 Allen (Mass.), 332; *Chase v. Hamilton Ins. Co.*, 20 N. Y. (6 Smith) 52; *Lockner v. Home Mut. Ins. Co.*, 17 Miss. (2 Bennett) 247. These cases are distinguished from *Plumb v. Catta-raugus Co. Mut. Ins. Co.*, 18 N. Y. (4 Smith) 392, and similar cases before cited, *ante*, § 132. In that case there was no such stipulation.

² *Bentley v. Columbia Ins. Co.*, 17 N. Y. (3 Smith) 421.

³ *Ibid.*

⁴ *Ex parte Hennessy*, 1 Con. & Law. 559.

to the company, will not fix the liability of the latter, although it recites that the money received is "for insurance."¹

§ 138. **Authority after Negotiations are concluded.** — But unless expressly delegated or sanctioned by known and permitted usage, this power of moulding the terms of the contract does not extend to dealing with facts and circumstances arising after the contract has been perfected. And it behooves the applicant for insurance, unless he has the most satisfactory evidence that the agent with whom he is negotiating has general and unrestricted powers, to examine carefully into the extent of his authority; for the law holds him bound to know, not only whether the agent is a general or special one, but, if special, what are the limitations upon his authority. If it were not so, there would be no distinction between a general and a special agent, and all restrictions and limitations on an agent's authority would be nugatory. A principal would in all cases be at the mercy of his agent, however carefully he might have restricted his authority. An agent therefore to receive and forward applications, to countersign policies, to collect premiums, and bind the company on special hazards for ten days, is not the agent of the company to receive notice, and fix additional premium affecting its rights under a policy already issued; as where the policy provides that when premises are vacated the policy shall be void unless immediate notice be given to the company and an additional premium paid.² So though the agent have power to adjust losses he cannot waive a forfeiture.³

§ 139. **Mutual Insurance Agents.** — And substantially the same general principles have been applied in most of the courts in this country⁴ in reference to agencies of mutual

¹ *Linford v. Provincial Horse and Cattle Ins. Co.*, 10 Jur. n. s. 1066.

² *Harrison v. City Fire Ins. Co.*, 9 Allen (Mass.), 231.

³ *Phoenix Ins. Co. v. Lawrence et al.*, 4 Met. (Ky.) 9; *Tate v. Citizens' Mut. Ins. Co.*, 13 Gray (Mass.), 79. And see *post*, § 145. See also *Bartholomew v. Merchants' Ins. Co.*, 25 Iowa, 507.

⁴ Mutual fire insurance seems not to have had much vogue in England. The courts of Massachusetts, and to some extent those of Rhode Island, Pennsylvania, and New Jersey, hold that agents of mutual insurance companies have less extensive powers. See *post*, § 145 *et seq.*

insurance companies, which we have seen have been applied to agencies of stock, or, as they are sometimes called, proprietary companies, upon the general ground that incorporated companies, as well mutual as others, when business is necessarily conducted through agents, should be required to see that their officers and agents not only know what their powers and duties are, but that they do not habitually and upon system transcend those powers, else third persons who have no means of access to the by-laws and resolutions which govern the body corporate, and no means of judging in the particular instance whether the officer is or is not transcending his powers, cannot deal with them with any degree of safety. A mutual insurance company, for instance, whose rules prohibit the assignment of a policy, "unless by the consent of the company, manifested in writing," but whose uniform practice has been to signify that consent by an indorsement thereof on the policy, signed by the secretary, without any formal note or direction with reference to the matter, will not be permitted to deny that such is a consent of the company. They must be held responsible, as against strangers at least, on the ground of a tacit assent and approval, for the known act of their secretary. It might be different if the act were of such a nature that by strict vigilance and scrutiny it could not be known, and was not in fact known.¹ So the consent of an agent to further insurance indorsed on the policy, such being shown to be his practice known to the company, is equivalent to the consent of the directors subscribed by the secretary, required by a provision of the charter of the company.² And any customary exercise of authority known to the principal, and not repudiated, will bind the principal.³

§ 140. **Agent of Company not Agent of Applicant, though made so by a By-law of the Company.** — The local agent of a mutual insurance company authorized to receive and forward applications, is not necessarily the agent of the applicant also.

¹ *Conover v. The Mut. Ins. Co. of Albany*, 1 Comst. (N. Y.) 290, affirming s. c. 3 Denio (N. Y.), 254.

² *Peck v. New London Co. Mut. Fire Ins. Co.*, 22 Conn. 575.

³ *Brockelbank v. Sugrue*, 5 C. & P. 21.

And if at the time of the application the latter states facts material to the risk, and the agent neglects to communicate them to the company, in consequence of which a policy is issued in ignorance of the fact, the neglect is not imputable to the applicant so as to make him responsible as for a concealment. And that the agent was instructed to regard himself as the agent of the applicant rather than of the company, these instructions not being known to the applicant, does not alter the case.¹ And an agent duly appointed by the local agent, in pursuance of a custom known to and approved by the company, to solicit and forward to him applications for insurance, stands in the same relation to the company as to such mistakes.²

And the same is true where the agent assumes to fill up the application from actual observation, and, while giving a full description of the property, neglects to mention matters material to the risk, which, however, were open to his observation. This is no concealment or withholding of information on the part of the insured. And the company would be bound by the agent's over-estimated value of the property not induced by the applicant.³

So if the agent neglects to state in the application the fact of an existing incumbrance which is truly stated to him by the applicant, notwithstanding the application, by a memorandum in the margin, required the applicant to state whether the property is incumbered, by what, and to what amount, and if not, to say so; and although the by-laws make the person taking the survey the agent of the applicant. He is still the agent of the company, and as such it is so far bound by his acts that it cannot set up his negligence as a concealment on the part of the insured.⁴

§ 141. Agent may by his Acts estop his Principal. — Indeed such an agent may so conduct his business as to estop the company he represents from denying the truth of the state-

¹ *Beebe v. The Hartford Mut. Fire Ins. Co.*, 25 Conn. 51.

² *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517.

³ *Cumberland Valley Mut. Prot. Co.*, 29 Penn. St. (5 Casey) 31.

⁴ *Masters v. Madison Co. Mut. Ins. Co.*, 11 Barb. (N. Y. S. C.) 624; *Columbian Ins. Co. v. Cooper*, 50 Penn. St. 331; *ante*, § 131.

ments made in the application ; as by assuming to fill up and forward an application, signed by himself as agent of the applicant, but without authority to do so. Thus where the agent was requested by the applicant to copy the answers which he was upon the point of making in another application for insurance upon the same property, but instead of waiting till he received such answers to copy, forwarded to his company an old application for insurance upon the same property, corrected by himself to suit what he supposed to be the change of circumstances, thus sending an application which he was not authorized by the applicant to send ; he was held to be the agent of the company so far as to estop them from denying the contract, and from setting up its mistakes as misrepresentations working a forfeiture. He was at least the agent of the company for forwarding the application, and his misconduct in that regard was imputable to his principal, and could not be allowed to prejudice the rights of the applicant who did not know of it, and supposed, and had a right to suppose, he was insured upon the basis of the application which he actually did send to the agent, but which the agent did not forward. And the court would not compel the insured to go to a court of equity for relief, feeling authorized as a court of law to apply precisely the same rules of equitable waiver and estoppel as are applied in courts of equity.¹

But if an agent to whom the assured by letter applies for insurance fills up an application, and signs thereto the name of the assured, though without his knowledge, and the insured afterwards receives a policy with a copy of the application annexed, the application being expressly made part of the contract, and the contract providing that by accepting the policy the insured becomes responsible for the truth of the statements contained in the application, the fact that the original statement was made by the agent, and without the knowledge of the assured, will not avail to prevent a forfeiture by reason of a material false statement.²

¹ *Wilson v. Conway Mut. Fire Ins. Co.*, 4 R. I. 141. And see also *Denny v. Conway Stock and Mut. Fire Ins. Co.*, 13 Gray (Mass.), 492; *Ames v. N. Y. Union Ins. Co.*, 14 N. Y. 258.

² *Richardson v. Maine Ins. Co.*, 46 Me. 394.

§ 142. **Their Knowledge and their Mistakes** those of the Principal. — And such agent's knowledge of the existence of a fact material to the risk, as for instance a steam-boiler in the building, but not mentioned in the application, is the knowledge of the company, and precludes them from excepting to the defect in the application.¹

And material errors made by the agent in the surveys and measurements, such as if made by the applicant would amount to a breach of warranty, cannot be set up by the company in defence to an action for a loss under the policy. The misstatement is in law the misstatement of the company; and although the writing must be held to express the contract of the parties, and cannot be varied by parol evidence, yet when the insurance company who made this statement attempts to show that it is false, for the purpose of showing a breach of the warranty, it may justly be estopped to deny what it has once asserted.²

So if the agent of the company, there being no written application, gives a description of the property, from his own knowledge obtained by personal examination, which description is inserted in the policy, and it is denied that the property destroyed was covered by the policy, the company will not be allowed to take advantage of any inaccuracy in the language of the description, there being no evidence of any attempt to mislead on the part of the assured.³

§ 143. **Agent's Power to waive and estop.** — It has, in fact, been very generally held that knowledge by, or notice to, the agent, of the inaccuracy of a statement in the application upon which a policy is issued after such notice or knowledge, binds the company, and prevents them from availing themselves of the inaccuracy in defence, some of the cases regarding the facts as amounting to a waiver, and others as working an estoppel *in pais*. And this is true even though the policy provide that when the application is made through an agent of

¹ Campbell v. Merchants' and Farmers' Mut. Ins. Co., 37 N. H. 35; *ante*, § 132.

² Plumb v. Cattaraugus Co. Mut. Ins. Co., 18 N. Y. (4 Smith) 392; Howard Ins. Co. v. Bruner, 23 Penn. St. (11 Harris) 50.

³ Meadowcraft v. Standard Fire Ins. Co., 61 Penn. 91. And see *ante*, § 132.

the company the applicant shall be responsible for such agent's representations.¹

And, indeed, the tendency of the courts generally is daily becoming more decided to hold that such an agent may waive any of the conditions of the policy and bind the company by such waiver, and that his promises and acts, both of omission and commission, representations, statements, and assurances, made within the scope of his agency, and after knowledge of a breach of condition or of the inaccuracy of the statements in the application, if relied upon by the insured, who is himself without fault, may be set up by the insured, either on the ground of waiver or of estoppel, in answer to a claim of forfeiture.²

The local agent of an insurance company authorized to issue and renew policies, and receive premiums, may consent

¹ *Miller v. Mut. Ben. Life Ins. Co.*, 31 Iowa, 216; *Clark v. Union Mut. Fire Ins. Co.*, 40 N. H. 333; *Peck v. New London Co. Mut. Fire Ins. Co.*, 22 Conn. 575; *Hodgkins v. Montgomery Co. Mut. Ins. Co.*, 34 Barb. 213; *Patten v. Merchants' and Farmers' Mut. Fire Ins. Co.*, 40 N. H. 375; *Campbell v. Merchants' and Farmers' Mut. Ins. Co.*, 37 N. H. 35; *Marshall v. Columbia Mut. Ins. Co.*, 7 Fost. (N. H.) 157; *Prot. Ins. Co. v. Harmer*, 2 Ohio (N. Y.), 452; *Howard Fire Ins. Co. v. Bruner*, 23 Penn. St. 50; *Rex v. Insurance Companies*, 2 Phila. (Penn.) 357; *Kelley v. Troy Fire Ins. Co.*, 3 Wis. 254; *Masters v. Madison Co. Mut. Ins. Co.*, 11 Barb. (N. Y.) 624; *Plumb v. Cattaraugus Co. Mut. Ins. Co.*, 18 N. Y. (4-Smith) 392. And see also *New Castle Fire Ins. Co. v. Macmoran et al.*, 3 Dow, 255, where it seems to have been taken for granted that such was the law. *Perry Co. Ins. Co. v. Stewart*, 19 Penn. St. 45; *Ames v. N. Y. Union Ins. Co.*, 14 N. Y. 258; *Somers v. Atheneum Fire Ins. Co.*, 9 L. C. 61; *Michael v. Mut. Ins. Co. of Nashville*, 10 La. 737; *Roth v. City Ins. Co.*, 6 McLean, U. S. 324; *Rowley v. Empire Ins. Co.*, 40 N. Y. 557; *Franklin v. Atlantic Ins. Co.*, 40 Me. 559; *Beal v. Park Ins. Co.*, 16 Wis. 241. The cases of *Kennedy v. St. Lawrence Co. Mut. Ins. Co.*, 10 Barb. (N. Y.) 285; *Sexton v. Montgomery Co. Mut. Ins. Co.*, 9 ib. 191; and *Jennings v. Chenango Co. Mut. Ins. Co.*, 2 Denio (N. Y.), 75, to the contrary, cannot be reconciled with the later cases in the New York courts.

² *Columbia Ins. Co. v. Cooper*, 50 Penn. St. 331; *Franklin v. Atlantic Fire Ins. Co.*, 42 Mo. 456; *Keeler v. Niagara Ins. Co.*, 16 Wis. 523; *Viale v. Germania Ins. Co.*, 26 Iowa, 9; *Boehen v. Williamsburg Ins. Co.*, 35 N. Y. 131; *May v. Buckeye Mut. Ins. Co.*, 25 Wis. 291; *Peoria M. and F. Ins. Co. v. Hall*, 12 Mich. 202. By statute in New Hampshire it is provided, in relation to the insurance companies of that State, that when applications are taken by an agent the policy shall not be void by reason of any error, mistake, or misrepresentation not intentionally and fraudulently made. Laws 1855, c. 1662, § 6. The law has, however, no effect upon foreign insurance companies. *Campbell v. Merchants' and Farmers' Mut. Ins. Co.*, *ubi sup.*

to a change of title,¹ or he may waive a forfeiture by reason of change of title, by the acceptance of the premium and the issue of a renewal receipt, with full knowledge of the change of title.²

§ 144. And to these numerous and respectable authorities the Supreme Court of the United States has recently added the weight of its deliberate approval.³ That court holds the following language: "This question has been decided differently by courts of the highest respectability in cases precisely analogous to the present. It is not to be denied that the application, logically considered, is the work of the assured, and if left to himself as to such assistance as he might select, the person so selected would be his agent, and he alone would be responsible. On the other hand, it is well known — so well that no court would be justified in shutting its eyes to it — that insurance companies organized under the laws of the State, and having in that State their principal business office, send their agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hands to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts; and the party who is in this manner induced to take out a policy rarely sees or knows any thing about the company or its officers by whom it is issued, but looks to, and relies upon, the agent who has persuaded him to effect insurance, as the full and complete representative of the company in all that is said or done in making the contract. Has he not a right to so regard him? It is yet true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this, and yet limit the responsibility of the acts of these agents to the simple receipt

¹ *Ill. Mut. Fire Ins. Co. v. Stanton* (1872), 2 Ins. L. J. 29.

² *Miner v. Phoenix Ins. Co.*, 27 Wis. 693; s. c. 1 Ins. L. J. 41.

³ *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222.

of the premium and delivery of the policy ; the argument being that, as to all other acts of the agent he is the agent of the insured. This proposition is not without support in some of the earlier decisions on the subject ; and, at a time when insurance companies waited for parties to come to them to seek assurance, or to forward application on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine in its full force to the system of selling policies through agents, which we have described, would be a delusion and a snare, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance companies receive the benefit, and the parties supposing themselves insured are the victims. The tendency of the modern decisions in this country is steadily in the opposite direction. The powers of the agent are, *prima facie*, coextensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the persons with whom he deals.¹ An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal.²

“ In the fifth edition of American Leading Cases, after a full consideration of the authorities, it is said : ‘ By the interested or officious zeal of the agents employed by the insurance companies in the wish to outbid each other and procure customers, they not unfrequently mislead the insured by a false or erroneous statement of what the application should contain, or, taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn and will meet the requirements of the policy. The better opinion seems to be that, when this course is pursued, the description of the risk should, though nominally proceeding from the

¹ *Beebe v. Hartford Ins. Co.*, 25 Conn. 51 ; *Lycoming Ins. Co. v. Schollenberger*, 8 Wright (Penn.), 259 ; *Beal v. Park Ins. Co.*, 16 Wis. 241 ; *Davenport v. Peoria Ins. Co.*, 17 Iowa, 276.

² *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517 ; *Horwitz v. Equitable Ins. Co.*, 40 Mo. 557 ; *Ayres v. Hartford Ins. Co.*, 17 Iowa, 176 ; *Howard Ins. Co. v. Bruner*, 11 Har. (Penn.) 50.

assured, be regarded as the act of the insurers.’¹ The modern decisions fully sustain this proposition, and they seem to us founded in reason and justice, and meet our entire approval. This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it.” And in a very recent case in Iowa,² the broad proposition is affirmed that “an insurance company transacting business through an agent having authority to solicit, make out, and forward applications, to deliver policies when returned, and to collect and transmit premiums, is affected by the knowledge acquired by such agent when engaged in procuring an application, and bound by his acts done at such time with respect thereto.”

In order, however, that statements made to the company’s agent, but misunderstood or not set down by him in the application, may protect the insured from the consequences of misrepresentation, it should appear that they were made at the time when the application was taken, and in connection therewith; statements made at a prior and fruitless interview cannot have that effect.³

§ 145. **Courts of Massachusetts and Rhode Island more Strict.** — But the courts of Massachusetts and Rhode Island, notwithstanding the admitted hardship of the case, have refused to yield to the strong equity of the claim of the assured under like circumstances. Looking upon the attempt to show by parol evidence that the facts untruly stated, or carelessly or incautiously omitted, were known to the insurers or their agent when the policy was issued, as a direct violation of the rule that parol evidence cannot be admitted to con-

¹ Vol. ii. p. 947; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550.

² *Miller v. Mut. Benefit Life Ins. Co.*, 31 Iowa, 216.

³ *Boggs et al. v. American Ins. Co.*, 30 Mo. 63.

tradict or vary the terms of a written agreement, they have persistently excluded such evidence, even in cases where the insurers were notified by the insured, and assented to the omission. Thus, a failure to mention in the application the fact that part of the premises insured was used as a grist-mill, the same being included in a memorandum of special hazards, the neglect to mention which involved a forfeiture of all rights under the policy, was held to be fatal to the claim of the assured, though the agent was fully authorized to make contracts of insurance, without reference to the company for its sanction, and examined the property, saw the grist-mill, agreed and suggested what was material to be stated, and in fact filled up the application himself.¹ And the same doctrine has been repeatedly held where the insurers themselves had knowledge of, and assented to, the fact which was afterwards allowed to be set up as a defence to the claim of the insured.² They hold with equal strictness that agents of mutual insurance companies employed by them to procure and forward applications, and authorized to receipt for premiums, although it is their custom to fill up the applications, and make such explanations as may be necessary, are nevertheless generally to be regarded as the agents of the applicants also, at least so far as to make the applicants responsible for the statements contained in the application. The mistake of the agent is their mistake; and though in point of fact the answer or statement was truthfully and accurately made to the agent, and if set down as given would have been correct, yet if, by inadvertence or infirmity, it is untruly set down, a court of law must hold the applicant to the terms of his contract, and cannot admit evidence to show that it was really different from what it appears to be.³

¹ *Lee v. Howard Fire Ins. Co.*, 3 Gray (Mass.), 583.

² *Bennett v. Union Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 173.

³ *Holmes et al. v. The Charlestown Mut. Fire Ins. Co.*, 10 Met. (Mass.) 211; *Jenkins v. The Quincy Mut. Fire Ins. Co.*, 7 Gray (Mass.), 370; *Wilson v. Conway Mut. Fire Ins. Co.*, 4 R. I. 141; *Barrett et als. v. The Union Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 175; *Kibbe v. Hamilton Mut. Ins. Co.*, 11 Gray (Mass.), 163; *Abbott v. Shawmut Mut. Fire Ins. Co.*, 3 Allen (Mass.), 213. In Pennsylvania also a tendency to the same strictness has been shown. *Smith v. Ins.*

And in a later case, the same court, where the premium had actually been paid to the agent of the company, but was not paid over or tendered to the company until eight days after the date of the policy, and after the loss, the policy providing that every agent forwarding applications, or receiving premiums, is the agent of the applicant and not of the company, reaffirms the doctrine of the above cases, and denies the authority of the agents and officers of a mutual insurance company to waive the by-laws and provisions which relate to the substance of the contract, adopted by the members of such company for their mutual protection.¹ Nor has such an agent authority to perfect the contract, in behalf of the company, especially if the receipt specifies that the premium is to be refunded if the office does not approve; a sufficiently clear intimation, it would seem, of the agent's want of authority to make the contract.² Nor is the delivery of a new premium note to him by the assignees, after an alleged transfer of the policy, where the validity of the assignment depends upon the question whether the company at the time of their assent had knowledge of the delivery of the note, a delivery to the company so as to affect them with knowledge of the fact.³ Nor can an agent to take and transmit policies, to whom the insured surrenders his policy for cancellation, bind the company by his promise to deliver up the premium note, although the policy be actually cancelled. The cancellation of the policy does not relieve the note from liability to assessment for losses prior to the surrender, and the agent is clothed with no authority to give up the securities of the company.⁴ It is doubtful whether the company itself could surrender the note

Co., 24 Penn. St. 320. But see *contra*, a quite recent case, Spring Garden Ins. Co. v. Scott, Phila. Leg. Int. March 14, 1870, and *post*, § 148 *et seq.* And in Kentucky, Prot. Ins. Co. v. Hall, 15 B. Mon. (Ky.) 411.

¹ Mulrey v. The Shawmut Fire Ins. Co., 4 Allen (Mass.), 116. In the cases above cited from the 10th of Met. and 7th of Cush. it is intimated that equity might relieve in such a case; and so it undoubtedly will. See also Wilson v. Conway Mut. Fire Ins. Co., 4 R. I. 141.

² N. Y. Union Mut. Ins. Co. v. Johnson, 23 Penn. St. (11 Harris) 72.

³ Fogg et als. v. Middlesex Mut. Fire Ins. Co., 10 Cush. (Mass.) 337.

⁴ Marblehead Mut. Fire Ins. Co. v. Underwood, 3 Gray (Mass.), 210.

under such circumstances. This might be tantamount to a wilful omission of the note in calculating the assessment, and if so, it would vitiate the assessment.

But if the agent sends in an application which was never authorized, instead of a defective application which was authorized, the company will be bound as if no application was ever made, if the policy be issued upon the first, or, if upon the last, then they will be bound if the defective application be good so far as it goes.¹ The applicant is bound by an application which he authorizes, though he may not know its contents.²

§ 146. **So as to the Power of Officers of Mutual Companies.** — And in that State the officers of mutual insurance companies are held to the strictest compliance with the requirements of the by-laws, and limited to the exercise of such powers as are thereby conferred. Mutual insurance, it is truly observed, is essentially different from stock insurance, and much of the litigation that has grown out of this species of insurance has been owing to inattention to this difference. Its original design was to provide cheap insurance by means of local associations, the members of which should insure each other. Such associations are in their nature adapted only to local business. They need many by-laws and conditions that are not required in stock companies; and it is necessary and equitable that each person who gets insured in them should become subject to the same obligations towards his associates that he requires from them towards himself. If the officers have discretionary power as to the terms of the contract, or even as to its form, it is obvious that different parties may become members upon different terms and conditions, and thus the principle of mutuality will be completely abrogated. When the company have once determined the forms in which their policies shall be made, and the conditions upon which they are willing to contract, it is nothing less than a violation of duty for the officers to undertake to bind the companies they represent by other and inconsistent contracts, parol or

¹ *Blake v. Exchange Mut. Ins. Co.*, 12 Gray (Mass.), 265.

² *Draper v. Charter Oak Ins. Co.*, 2 Allen (Mass.), 569.

otherwise.¹ Hence where the by-laws of a company provide that subsequent insurance obtained, and subsequent alterations made, without the consent in writing of their president, shall avoid the policy, the verbal consent of the president is unauthorized.² Nor when the by-laws require that the premium shall be paid before the policy shall take effect, has any officer the power to bind the company by an agreement that notwithstanding the non-payment of the premium the policy shall be effected.³ Nor to estop the company by a representation that insurance has been obtained, when in fact the premium has not been paid.⁴ For the same reason, where the charter provides that an applicant shall deposit his note before he receive a policy, no officer can waive the condition by an assurance that the risk shall commence immediately and before the policy is issued.⁵ The same rule, however, does not apply where the provision for the prepayment of the premium is not a condition, or by law or otherwise a part of the policy, but is a merely collateral agreement appended to the application. In such case the prepayment of the premium may be waived by any officer or agent the general scope of whose duties gives him a right to act in the premises.⁶

§ 147. **This Rule Applicable only to By-laws which are of the Essence of the Contract.**— But the courts of Massachusetts make a distinction between by-laws and provisions which go to the substance and essence of the contract and those which do not. Of the latter class are stipulations as to preliminary proof of loss. As these relate only to the form or mode in which the liability of the company shall be ascertained and proved, and must necessarily be submitted to the officers of the corporation, who must pass upon their sufficiency; and as, furthermore, in ascertaining and settling losses, they frequently act upon personal investigations made by themselves or their agents, thereby obtaining knowledge which renders the pre-

¹ *Evans v. Trimountain Mut. Fire Ins. Co.*, 9 Allen (Mass.), 329.

² *Hale v. Mechanics' Mut. Ins. Co.*, 6 Gray (Mass.), 169.

³ *Brewer v. Chelsea Mut. Fire Ins. Co.*, 14 Gray (Mass.), 203.

⁴ *Baxter v. The Same*, 1 Allen (Mass.), 294.

⁵ *Belleville Mut. Ins. Co. v. Van Winkle*, 1 Beasley (N. J.), 333.

⁶ *Sheldon v. Conn. Mut. Life Ins. Co.*, 25 Conn. 207.

liminary proof wholly immaterial, it is held to be within the scope of their authority to say when the proof is sufficient, and if they deem it expedient, to dispense with the literal requirements of the by-laws in this particular.¹ But a mere statement by an agent, after notice to him of loss, "that the matter would be all right with the company," does not relieve the party insured from the necessity of making his preliminary proof.² Nor will the mere fact that the agent resided at the place of the fire and personally knew all the circumstances attending it.³

§ 148. In Pennsylvania, also, the distinction between mutual and stock companies is regarded as essential. In the case of *Hackney v. The Alleghany Mutual Insurance Company*,⁴ the question of the responsibility of mutual insurance companies for the unauthorized and false declarations of their agents arose under the following facts. The agent of the company bore a certificate of the fact of his agency, signed by the president of the company, and authorizing him "to receive applications for insurance and the premium thereon." In defence it was proposed to prove that at the time the agent requested the plaintiff in error to become a member, he represented that the company was not insuring in the city of Pittsburgh and other large cities, and that upon this representation the premium note was given. But the court held that the evidence was rightly rejected, as the declarations of the agent were not within the scope of his authority, which extended only to receiving applications and premiums. And had the declaration been made by the president himself it would not have been binding upon the company; for, say the court, "there is no such privity among the corporators or the officers of the company as to make the admission of either binding upon all."⁵

¹ *Priest et als. v. The Citizens' Mut. Fire Ins. Co.*, 3 Allen (Mass.), 605. The case of *Davis v. North River Ins. Co.*, 7 Cowen (N. Y.), 462, does not advert to this distinction, and cannot now be regarded as sound law. And the same may be said of *McEvers v. Lamoine*, 1 Hoff. Ch. (N. Y.) 172.

² *Bogle v. North Carolina Mut. Ins. Co.*, 7 Jones' Law (N. C.), 373.

³ *Smith v. Haverhill Mut. Fire Ins. Co.*, 1 Allen (Mass.), 297.

⁴ 4 Barr (Penn.), 185.

⁵ 5 Day, 309.

If such verbal conversations were admitted in evidence against the written engagements of the corporators, their policies would be worthless, and the utility of mutual insurance companies at an end."

§ 149. In the same State it has also been held, upon grounds which would seem to be sufficient without relying upon the distinction, that where the insurance is in a mutual office, and the agent of the office fills up the application, itself expressly made a warranty, and, with the knowledge of the assured, states what is by both of them known to be material and untrue, as, that there is a chimney and stove well secured, with the pipe passing through a crock well secured, when, in fact, there is neither chimney nor stove, the misstatement will be fatal; nor will it be excused by an agreement, not communicated to the company, between the agent and the assured, that, before a fire should be kept in the building, a chimney should be erected and the stove-pipe secured as represented. Such an agreement the agent clearly has no authority to make.¹ In this case the case of *Howard Insurance Company v. Bruner*² was referred to and distinguished. "That," said the court, "was not a mutual company. The agent who wrote out the description, instead of being limited to a mere reception of applications, was clothed with large powers, settled the terms of insurance, and countersigned and issued the policies without referring applications to the company. Under the circumstances . . . we held that the written survey was the act of the agent, and that the assured was not to be prejudiced by the omission of facts which he stated but which the agent omitted to set down." Reference was also made to *Susquehanna Insurance Company v. Perrine*,³ in which the applicant was held responsible for the omissions of the agent, stress being laid upon the fact that the company was a mutual one, and by one of its by-laws made the applicant responsible for the agent's accuracy in making the survey. Yet in that case, Gibson, C. J., said: "A regulation established by a by-law is not obligatory on

¹ *Smith v. Cash Mut. Fire Ins. Co.*, 24 Penn. St. (12 Harris) 320.

² 11 Har. (Penn.) 50.

³ 7 W. & S. 348.

a stranger; and, if the plaintiff were such, he would not be affected by the blunder of the company's surveyor, notwithstanding the terms of application prescribed by the conditions of insurance;" a doctrine which is in harmony with *Howard Insurance Company v. Bruner*.¹

§ 150. But in Pennsylvania, where insurance was effected by the agent of a stock company upon "barley and malt in assured's malt-house and brewery," subject to the condition that if the risk was increased without notice to the company, and an indorsement of consent on the policy, the policy should be of no force, and notice was given before the execution of the policy to the agent of the company, that the insured intended to distil and store whiskey in the buildings containing the property insured, during the currency of the policy, it was held, that although there was no indorsement of the consent, the company had, through notice to its agent, knowledge that distilling had been added to the business of brewing before the policy issued, and consequently this was one of the risks which they intended to insure against, and therefore no indorsement was necessary.²

§ 151. **General Agent with unlimited Powers.** — And a general agent, there being no limitation of his authority, may even by an oral agreement extend the scope of a policy already issued, so as to make it cover property not embraced in the policy when issued, such policy being an open one, and intended to cover property of a certain character, which might be at risk at different times, the property being of the general character of that insured in the original policy. And his oral agreement will bind the company, although the policy purports to be upon property "as per indorsements to be made thereon," and there is no indorsement of the property which the agent verbally agrees to insure.³ And he may correct an error in the policy after its issue.⁴

¹ 11 Harris, 50. In fact the latter case was tried before that distinguished judge, and the ruling excepted to and sustained was his ruling. See also *ante*, § 132, and *Moliere v. Penn. Fire Ins. Co.*, 5 Rawle, 342.

² *Peoples' Ins. Co. v. Spencer*, 53 Penn. St. 353. And see *ante*, § 148.

³ *Kennebec Co. v. Augustus Ins. and Banking Co.*, 6 Gray (Mass.), 204.

⁴ *Warren v. Peoria Mar. and Fire Ins. Co.*, 14 Wis. 318.

So a general agent for a foreign insurance company, resident in Massachusetts, appointed under the statute requiring a general agent upon whom service of process may be made, and having the general charge of the business in the State, has power to waive the conditions of the policy as to preliminary proof of loss.¹

And such an agent may waive a condition making the validity of the policy dependent on the prepayment of the premium.² So he may waive a breach of the conditions of the policy requiring notice of other insurance, by delivering a renewal receipt, signed by the president and secretary, and accepting the premium after knowledge of the breach, though the receipt by its terms is not to be effectual unless countersigned by the agent;³ and he may give credit for the renewal premium, or take a note therefor, and bind the company by parol, though he hold such receipt,⁴ and waive a requirement that the policy to be valid must be countersigned by him.⁵

§ 152. **Notice to Agent when Notice to Principal.**—If, when notice to the company is required of any particular fact, the notice be given to the board of directors, or to any officer or agent of the company whose duty by the by-laws, resolutions, and usages of the company, or of the business, or to any persons from whose relation to the company third persons might fairly infer such duty, it was, upon receiving such notice, to communicate it to the company, this will be a sufficient compliance with the requirement.⁶ Notice to an agent appointed to receive and forward applications and premiums is sufficient; and it need be verbal only, unless required by the terms of the policy to be in writing.⁷ And notice to an agent, at the time

¹ Eastern Railroad Co. v. Relief Ins. Co., 105 Mass. 570.

² Boehen v. Williamsburgh City Ins. Co., 35 N. Y. 131.

³ Carroll v. Charter Oak Ins. Co., 40 Barb. (N. Y.) 292.

⁴ Post v. Aetna Ins. Co., 43 Barb. 351; Franklin Fire Ins. Co. v. Massey, 33 Penn. 221.

⁵ Myers v. Keystone Mut. Life Ins. Co., 27 Penn. St. 268.

⁶ Union Mut. Ins. Co. v. Wilkinson, 13 Wall. (U. S.) 222; *ante*, § 144; Peck v. New London Co. Mut. Ins. Co., 22 Conn. 575.

⁷ McEwen v. Montgomery Co. Mut. Ins. Co., 5 Hill (N. Y.), 101; Sexton v. Montgomery Co. Mut. Ins. Co., 9 Barb. (N. Y.) 101; Schenck v. Mercer Co. Mut. Ins. Co., 4 Zab. (N. J.) 447.

of effecting the insurance, of subsequent insurance, is notice to the company under a provision of the contract that notice of subsequent insurance shall be given to the company.¹ But after the completion and delivery of the policy, then the agent merely to receive applications and make surveys cannot bind the company by approving such insurance.² But mere knowledge of the fact of such insurance on the part of the agent is not equivalent to notice to the company;³ nor is such knowledge a waiver of the notice.⁴ And it is not notice, within the meaning of a proviso that notice shall be given to the agent or secretary of alterations increasing the risk.⁵ Knowledge of prior insurance in the same office is notice of other insurance.⁶ But a personal examination by the president and one of the directors of a company after a fire, is equivalent to notice of the loss to the company, such officers having thus acquired all the knowledge that would be desired from the required notice.⁷

§ 153. In Pennsylvania, however, the knowledge and consent of the agent to subsequent insurance has been held to be not that of the company. Thus where it was stipulated in the policy, that insurance should not be obtained upon the property to an amount beyond two-thirds of its value, the obtaining insurance beyond that amount was held to work a forfeiture, unless the company, after notice, waived the forfeiture; and it was also held not to be within the authority of an agent empowered only to make surveys, receive applications, examine into the circumstances of loss, approve assignments, and receive assessments, to accept notice, and by his consent, after the issue

¹ *New England Fire and Mar. Ins. Co. v. Schettler*, 38 Ill. 166.

² *Wilson v. Genessee Mut. Ins. Co.*, 4 Kern. (N. Y.) 418, reversing s. c. 16 Barb. (N. Y.) 511.

³ *Schenck v. Mercer Co. Mut. Ins. Co.*, 4 Zab. (N. J.) 447; *Mellen v. Hamilton Fire Ins. Co.*, 5 Duer (N. Y.), 101; s. c. affirmed, 17 N. Y. 609; *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 170.

⁴ *Forbes v. Agawam Mut. Ins. Co.*, 9 Cush. (Mass.) 470.

⁵ *Sykes v. Perry Co. Mut. Ins. Co.*, 34 Penn. St. 79; *Robinson v. Mercer Co. Mut. Fire Ins. Co.*, 3 Dutch. (N. J.) 134.

⁶ *Rowley v. Empire Ins. Co.*, 36 N. Y. 550.

⁷ *Roumage v. Mechanics' Fire Ins. Co.*, 1 Green (N. J.), 110. And see also *ante*, § 143.

of the policy, to waive the forfeiture ; and his approval therefore could be of no avail to the insured. It is on the principle of estoppel, and not of authority, the waiver takes place. The knowledge of a mere agent, unauthorized to represent the company beyond the specific powers committed to him, cannot be the ground of estoppel in a matter unconnected with the exercise of his powers. This can only take place when the knowledge, lying at the foundation of the estoppel, comes home to those officers who exercise the corporate powers of the company, or to an agent whose powers relate to the very subject out of which the estoppel arises.¹ Otherwise if notice is given before the policy issues.² So in Massachusetts, notice to an agent of alienation or assignment is not notice to the company, nor has the agent power to waive such notice, if required by the policy, nor to bind the company by his opinion that notice is not necessary.³

§ 154. *Sub-agents and Clerks.*—Where insurers issue their policies in blank, to be valid only when countersigned by their duly authorized agents, and appoint a firm of several persons to act as their general agents for a particular State, and refer to them as having charge of the appointment of agents within that State, a sub-agent appointed by one of the members of the firm, having a branch office at a place other than the chief place of business of the firm, will thereby acquire the power to countersign the policies. And a policy so countersigned will bind the company, notwithstanding that prior to the issue of the policy the firm holds a power of attorney from the insurance company empowering them to “receive moneys and to countersign and issue policies,” and a like power of attorney was forwarded to the members of the firm who appointed the sub-agent, some months after the appointment. These powers of attorney do not concern the public to whom they are unknown. They are rather in the nature of private instructions, binding between the principal and agent, but without effect as against the public, who have treated with the agents, on the

¹ *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Penn. St. 402.

² *Peoples' Ins. Co. v. Spencer*, 53 Penn. St. 353.

³ *Tate v. Citizens' Mut. Fire Ins. Co.*, 13 Gray (Mass.), 79.

assumption that they actually had the power, which they exercised and were known by their principals to have exercised.¹ So the clerk of an agent whose acts have been recognized by the company and accepted, may bind the company by his consent to a part payment of the premium.² Under a like stipulation it has been held in Kentucky that the signature by a third person "for the agent," is not a compliance with the stipulation, and such a policy is void.³ And generally agents of insurance companies authorized to contract for risks, receive and collect premiums, and deliver policies, may confer upon a clerk or subordinate to exercise the same powers. The service is not of such a personal character as to come under the maxim, *delegatus non potest delegare*.⁴

§ 155. **Agents of Accident Insurance Companies.**—Certain kinds of accident insurance—as of railway passengers—are effected by means of the purchase and sale of tickets issued by the companies to their agents, and sold by them or those in their employ like merchandise, the sale and delivery of the ticket by the agent or his employé on the one hand, and the payment of the premium by the purchaser on the other, consummating the contract. And the contract holds good whether the purchaser obtains his ticket from the company directly or indirectly from any person having authority mediately from the company.⁵

¹ *Bowman v. U. S. Casualty Ins. Co.*, N. Y. Ct. of Appeals, affirming s. c. in N. Y. Sup. Ct. 1869, cited in Bliss, *Life and Ac. Ins.* 488; *Keenebec Co. v. Augusta Ins. and Banking Co.*, 6 Gray (Mass.), 204.

² *Bodine v. Exchange Fire Ins. Co.*, 2 Ins. L. J. 23; N. Y. Com. of App. Sept. 1872.

³ *Lynn v. Burgoyne*, 10 B. Mon. (Ky.) 400.

⁴ *Bodine v. Exchange Fire Ins. Co.*, N. Y. Com. of App. 2 Ins. L. J. 23.

⁵ *Brown v. Railway Passenger Ass. Co.*, 45 Mo. 221.

CHAPTER VI.

OF WARRANTIES.¹

§ 156. **Definition of Warranty.**—In all contracts of insurance, certain statements are made, certain stipulations are entered into, and certain provisos, conditions, and by-laws are introduced or referred to, in a more or less explicit manner. As a general rule, if these statements, stipulations, &c., are contained in, or expressly made a part of, the policy, they become *warranties*, and are so denominated in the law of insurance. We say as a general rule, because we shall see as we advance in this chapter that there are important exceptions. “An express warranty is a stipulation inserted in writing on the face of the policy, on the literal truth or fulfilment of which the validity of the entire contract depends.” This is the definition given by Arnould,² which has met with general acceptance. By a warranty the insured stipulates for the absolute truth of the statement made, and the strict compliance with some promised line of conduct, upon penalty of forfeiture of his right to recover in case of loss should the statement prove untrue, or the course of conduct promised be unfulfilled. A warranty is an agreement in the nature of a condition precedent, and like that, must be strictly complied with.³

¹ Though we have treated the several subjects of warranty, representation, and concealment in separate chapters, it will be seen that these subjects are so nearly allied, that cases illustrative of each have much in common; and if it were material it would be difficult to determine under which chapter to arrange them. For the most part, a case in either chapter will illustrate the others, as the several subjects are almost invariably discussed together. And each subject will be further illustrated by cases cited when we come to treat of the several conditions, stipulations, and provisions of the contract.

² 1 Ins. 577.

³ Daniels et als. v. Hudson River Fire Ins. Co., 12 Cush. (Mass.) 416; Ripley v. Aetna Fire Ins. Co., 30 N. Y. 136; Campbell v. N. E. Mut. Life Ins. Co., 98 Mass. 381.

Whether the fact stated, or the act stipulated for, be material to the risk or not, is of no consequence, the contract being that the matter is as represented, or shall be as promised; and unless it prove so, whether from fraud, mistake, negligence, or other cause, not proceeding from the insurer, the insured can have no claim.¹

Indeed, one of the very objects of the warranty is to preclude all controversy about the materiality or immateriality of the statement. The only question is, has the warranty been kept? There is no room for construction; no latitude; no equity. If the warranty be a statement of facts, it must be literally true; if a stipulation that a certain act shall or shall not be done, it must be literally performed.² A learned judge and author declares it to be unfortunate that so strict a rule has been established, and intimates, what is no doubt entirely true, that courts are not at all inclined to go beyond the precedents to support a warranty.³

No particular form of words is necessary to constitute a warranty. Any statement or stipulation upon the literal truth or fulfilment of which depends the validity of the contract, whether appearing as a condition or warranted, or however otherwise, amounts to a warranty.⁴ But no particular form of words will make a statement or stipulation a warranty, where it is apparent that it is not the intention of the parties to make the validity of the contract depend on the literal truth or fulfilment of the statement or stipulation.⁵ Nor will all the statements made in an application which, by reference, becomes part of the policy, or, by agreement, is to have the force and

¹ *Newcastle Fire Ins. Co. v. MacMorran*, 3 Dow, P. C. 255; *Sayles v. North Western Ins. Co.*, 2 Curtis (C. C. U. S.), 612; *Witherell v. Marine Ins. Co.*, 49 Me. 200; *Pawson v. Watson*, Cowp. 785; *Anderson v. Fitzgerald*, 24 Eng. L. & Eq. 1; 4 H. of L. Cas. 484.

² *Ripley v. Ætna Fire Ins. Co.*, 30 N. Y. 163; *Hibbert v. Pigon*, Park, Ins. 339; s. c. Marsh. Ins. 272, per Lord Mansfield; *Anderson v. Fitzgerald*, 4 H. of L. Cas. 484; s. c. 24 Eng. L. & Eq. 1.

³ Per Duer, J., *Westfall v. Hudson River Fire Ins. Co.*, 2 Duer (N. Y. Superior Ct.), 490.

⁴ *Scales v. Scanlan*, 6 Irish Law, 367.

⁵ *Wheelton v. Hardisty*, 8 E. & B. 232; *Kingsley et al. v. New England Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 393.

effect of a warranty, therefore necessarily become warranties, since some other clause in the policy may qualify the reference. Thus where a "stock of merchandise" is insured, and the insured warrants the truth of his statements in regard to the "condition, situation, and value of the property insured," this does not include statements as to the occupancy of the building in which the insured property is located.¹

§ 157. Warranties are distinguished into two kinds: *affirmative*, or those which allege the existence at the time of insurance of a particular fact, and avoid the contract if the allegation be untrue; and *promissory*, or those which require that something shall be done or omitted after the insurance takes effect and during its continuance, and avoid the contract if the thing to be done or omitted be not done or omitted according to the terms of the warranty.²

§ 158. What constitutes a part of the Contract — Papers annexed and referred to. — Questions sometimes arise as to whether the statements and stipulations are embraced in, or constitute part of, the policy. Usually the application, proposals, conditions annexed, and by-laws are referred to in the policy itself, and by express terms made part of it; or they are declared to be the basis upon which it is made, or the policy is declared to be issued upon the faith thereof. When this is the case, of course there is no room for doubt. When, however, this is not the case, it becomes a question of the first importance to determine whether they are, or are not, part of the policy; for if they are not, then they are not warranties, but only representations, as to the truth of, and compliance with which, there is much less strictness required, as will be presently shown.

It is sufficient if they appear anywhere upon the face of the policy, though not written in the body of it, as upon the margin,³ or written across it;⁴ though they are not necessarily

¹ Howard Fire and Mar. Ins. Co. v. Cormick, 24 Ill. 455. And see *post*, § 161 *et seq.*

² Borradaile v. Hunter, 5 M. & G. 639; Jennings v. Chenango Co. Mut. Ins. Co., 2 Denio (N. Y.), 78; Stout v. City Fire Ins. Co., 12 Iowa, 371.

³ Bean v. Stupart, Doug. 11; Patch v. Phoenix Mut. Life Ins. Co., Sup. Ct. Vt. 1872; 2 Ins. L. J. 36.

⁴ Kenyon v. Berthon, Doug. 12, n.

warranties because they appear upon the face of the policy.¹ And where a policy printed upon one-half of a sheet was delivered, and upon the other half of the sheet were the "conditions of insurance," these conditions, so annexed, were held to be *primâ facie* a part of the policy, although no express reference was made to them in the body of the policy.² But a paper containing particular statements relating to the subject-matter of insurance attached to the policy at the time it is executed is no part of the policy.³ Nor is an unattached paper folded up and enclosed in the policy containing similar particulars.⁴ And an indorsement on the back of an accident policy, showing the classification of risks assumed by the company, with a preliminary statement explanatory of the rights of the different classes, can be regarded as part of the contract only so far as it is specifically referred to in the policy as constituting a part of it; and a reference to the classification will not import the preliminary explanatory statement into the contract.⁵ So, printed by-laws on the back of a policy are not part of the contract, unless referred to and made part of it.⁶ And a reference to another paper as an application or survey, or as containing representations, or in language not indicating that it is the intent to make the application part of the contract, does not make it a warranty.⁷ In Kentucky,⁸ it is held that reference to a paper for a more particular description, and as forming part of the contract, will not make it part of the con-

¹ Campbell v. New England Mut. Life Ins. Co., 98 Mass. 381.

² Murdock v. Chenango County Mut. Ins. Co., 2 Comst. (N. Y.) 210; Roberts v. Chenango County Mut. Ins. Co., 3 Hill (N. Y.), 501.

³ Bize v. Fletcher, Doug. 13, n.

⁴ Pawson v. Barnevelt, Doug. 13, n.; Same v. Watson, Cowp. 785. In Sillen v. Thornton (3 E. & B. 868), a description of the property contained in a paper attached to the policy, and referred to as attached thereto, was treated as a part of the policy, though the point was not discussed. But this was a liberality of construction in favor of the insurers which is inconsistent with the later decisions. In that case, however, the decision would doubtless have been the same had the attachment been treated as a representation.

⁵ Adm'rs of Stone v. U. S. Casualty Co., 34 N. J. (5 Vroom) 371.

⁶ Kingsley v. New England Mut. Fire Ins. Co., 8 Cush. (Mass.) 393.

⁷ Snyder v. Farmers' Ins. and Loan Co., 16 Wend. (N. Y.) 481; Houghton v. Manuf. Mut. Fire Ins. Co., 8 Met. (Mass.) 114.

⁸ Kentucky and Louisville Mut. Ins. Co. v. Southard, 8 B. Mon. (Ky.) 634

tract, — the effect of the reference being to confine the parties to the truth of the matter of description only. This is going farther perhaps than is sound in principle or would be safe in practice.¹ But the courts are disinclined to make a paper by reference a warranty and part of the contract unless clearly obliged to.²

§ 159. **Application and Survey, when Parts of Contract.** — As a rule, when the application is referred to as forming a part of the contract, the statements therein contained are held to have the force and effect of warranties. But as the application, whether embracing the survey, which in general is but a plan or description of the premises, showing with more or less completeness its condition and surroundings, or having the latter attached to it actually or by reference, contains merely the data upon which the real contract is based, and may be by parol only, if the policy contains no stipulation making its statements warranties, they will have the force and effect of representations only.³ A mere reference to an application or survey, in general terms, does not make its contents warranties. To effect this there must be other language used sufficient to indicate that it was the intention to make the paper referred to a part of the contract.⁴ And the same is true although there be added to the general terms of reference the statement that the reference is for a more full description.⁵ And though the application be referred to in such terms as to import it into the contract, if its statements be also referred to as “representations,” they will have that character notwithstanding they are made part of the contract.⁶ So if the reference, by a fair construction, appear to be for another purpose

¹ See the next section.

² *Sayles v. North Western Ins. Co.*, 2 Curtis (U. S. C. Ct.), 610.

³ *Columbia Ins. Co. v. Cooper*, 50 Penn. 331; *Denny v. Conway Stock and Mut. Ins. Co.*, 13 Gray (Mass.), 492.

⁴ *Delonguemare v. Tradesmen's Ins. Co.*, 2 Hall (N. Y. Superior Ct.), 589; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72; *Wall v. Howard Ins. Co.*, 14 Barb. (N. Y.) 383; *Sheldon v. Hartford Fire Ins. Co.*, 22 Conn. 235; *Commonwealth Ins. Co. v. Monninger*, 18 Ind. 352.

⁵ *Sugden v. Farmers' Ins. and Loan Co.*, 13 Wend. (N. Y.) 92; s. c. affirmed, 14 Wend. (N. Y.) 481.

⁶ *Houghton v. Manuf. Ins. Co.*, 8 Met. (Mass.) 114.

than to make its statements warranties.¹ In *Kentucky and Louisville Mutual Insurance Company v. Southard*,² the court were indisposed to admit that the principle which converts into a warranty every matter of fact or description relative to the property insured, which the parties have inserted in the policy, is to be applied to any such matter not inserted in the policy nor written upon it, though it be referred to therein as a part of the policy, is applicable to cases of fire insurance, even if it be the rule in marine insurance, which was doubted. Nor can a reference in a new policy to a former survey at the office of the agent through whom a foreign insurance had been effected, be considered as bringing that survey into the new contract as a "survey on file at the office," so as to make it a part of the new contract, there being no new application or survey or plan presented or filed at the office.³ Upon the same general principles, a party who accepts a policy "in reference to a survey on file at the office," the by-laws making "survey, plan, and description" "a warranty on the part of the insured," is not responsible for executory representations contained in the application, of which the survey formed a part, it appearing that the application was never signed by the insured, nor by any one authorized by him so to do. While, having accepted the policy subject to the survey, he will be held responsible for the accuracy of that, yet a survey imports only a plan and description of the present existing state, condition, and mode of use of the property, and does not by fair intendment embrace statements or representations of a promissory or executory nature relating to contemplated alterations or improvements in the property, or to the mode in which the premises are to be occupied during the continuance of the policy; and for these latter, not being shown to have recognized or adopted them, he is not responsible.⁴

§ 160. And where the language of reference is ambiguous, and does not clearly intend to make the application a part of

¹ *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381.

² 8 B. Mon. (Ky.) 634.

³ *Clinton v. Hope Ins. Co.*, 45 N. Y. 454.

⁴ *Denny v. Conway Stock and Mut. Fire Ins. Co.*, 13 Gray (Mass.), 492.

the policy, the doubt will be construed against the company. Thus "reference being had to the application for a more particular description, and the conditions annexed, as forming a part of the policy," has been held to import the conditions into the contract, but to leave the statements in the application without to stand upon the footing of representations, being referred to merely for the purpose of describing and identifying the property insured.¹

So, although the application be expressly made a part of the policy, its statements will not be regarded as warranties if qualified by other stipulations which afford a fair inference that the parties themselves did not so intend them. The by-laws may provide that the application shall be a part of the policy and "a warranty on the part of the insured," and that "the policy shall be void unless the applicant shall make a correct description and statement of all facts inquired for in the application, and also all other facts material in reference to the insurance, or to the risk;" yet, if in the application it is agreed that it is "a correct description of the property so far as regards the condition, situation, value, and risk on the same," and that "the misrepresentation or suppression of material facts" shall destroy the applicant's claim for damages, these latter stipulations, when construed together with the former, being not only unnecessary, if the assured is to be held to the literal and exact truth of his answers, but inconsistent with holding them to be strict warranties, reduce the answers to the quality of representations.² This case affords a good illustration of the over-caution in which insurance companies sometimes indulge, as well as of the great importance, in the construction of the contract of insurance, of carefully comparing the several stipulations with each other.³

A provision that the statements in the application are to be regarded as warranties, is controlled by a subsequent recital that the insured is to be responsible for their truth so far as

¹ *Trench v. Chenango County Mut. Ins. Co.*, 7 Hill (N. Y.), 122.

² *Elliott v. Hamilton Mut. Ins. Co.*, 13 Gray (Mass.), 139.

³ *Joyce v. Maine Ins. Co.*, 45 Me. 168; *Frisbie v. Fayette Mut. Ins. Co.*, 27 Penn. St. 325.

they are material to the risk, to such extent as to reduce the statements from the grade of warranties to that of representations.¹ And if the covenant is that the statements are true "so far as regards the value and risk," they are only warranties upon these points ; but as to all others, representations merely.²

§ 161. So, too, references in the proposal for a reinsurance to the statements made in the proposal for the original insurance as believed to be true, is no warranty of their truth, but simply a warranty of the belief in their truth ;³ and references to statements and agreements, in order to have the effect of avoiding the policy in case the statements prove untrue or the agreement be not strictly kept, must be so explicit as to make them equivalent to conditions precedent. And unless it is expressly so stipulated, the statements or agreements should, on the face of the instrument, clearly and precisely show that it is the intention of the contracting parties to make their literal truth, or literal performance, a condition precedent. If there be any doubt on this question, the statement or agreement will be held to have the force only of a representation.⁴

§ 162. **Constructive Warranties not favored.**—And the courts will also hold a stipulation, whether contained in the policy or in the application, to be a representation rather than a warranty when there is room for doubt from ambiguity of language or otherwise. Thus, where the policy was made with reference to the conditions annexed, but these were referred to not as conditions precedent, nor as forming part of the policy, but "for a more particular description," or "to be used and resorted to in order to explain the rights and obligations of the parties, in cases not otherwise specially provided for," the court said these were merely the statements of a collateral document, which both parties agreed to as an authoritative exposition of what they both understood as the

¹ Longhurst v. Conway Fire Ins. Co. (U. S. Dist. Ct.) Iowa, 1861.

² Lindsey v. Union Mut. Ins. Co., 3 R. I. 157.

³ Wheelton v. Hardisty, 8 El. & B. 232.

⁴ Wheelton v. Hardisty, Exch. Ch. 8 El. & B. 232; Stokes v. Cox, 1 H. & N. Exch. 320, 533.

facts, on the assumption and truth of which they contracted, and the relations in which they stood to each other.¹ So the words "on condition" do not necessarily import a condition precedent equivalent to a warranty, since the manner and circumstances under which they are used may indicate that such was not the purpose or intent. Thus when the words "on condition that the applicant take all risk from cotton waste" were used not in the same context with the other conditions, but inserted between the statement of the amount insured and the statement of the *locus* of the property, it was held that these words so used did not constitute a condition in the legal sense, as there was nothing which the insured or any other party was to do or omit, by way of performing the supposed condition, and no event was to happen that it might be saved. They amount simply to a declaration on the part of the insurers that they will not pay a loss by fire originating in cotton waste.²

§ 163. Some observations upon this point fell from the court in a case in Kentucky, which are worthy of note, and which, though their spirit has in too many instances been departed from, may be considered as illustrative of the present tendency of judicial decision: "Whatever might be the doctrine in case of marine policies," says Marshall, C. J., "in making which the insurer is in general wholly dependent upon the statements of the insured, with regard to the property and the risk, it has been seriously doubted, and, so far as we know, has not been established by judicial decisions, whether the principle of construing every matter of mere description contained in the body of the policy into a warranty should be applied with the same strictness to *fire policies*, where the misdescription is most generally the mistake of the underwriter's own surveyor. These warranties being conditions precedent, which must be performed or be true, however immaterial,

¹ Daniels et als. v. Hudson River Fire Ins. Co., 12 Cush. (Mass.) 426; Westfall v. Hudson River Fire Ins. Co., 2 Duer (N. Y. Superior Ct.), 490. See also Delonguemare v. Tradesmen's Ins. Co., 2 Hall (N. Y. Superior Ct.), 589; Trench v. Chenango County Mut. Ins. Co., 7 Hill (N. Y.), 122; Wilson v. Conway Ins. Co., 4 R. I. 141.

² Kingsley et al. v. New England Mut. Fire Ins. Co., 8 Cush. (Mass.), 393.

there is an obvious propriety that they should be contained in the policy, which is to be kept by the insured, not only that he may be enabled to make the proper averments when he comes to declare, but that he may be fully apprised of the effect intended to be given to his statements. Since if they are considered merely as representations, it is sufficient that they were made without fraud, and are substantially true in every point material to the risk.

“Under these considerations, we are of opinion that it is at least safe to conclude that the reference in this policy to the application and survey as a part thereof, being a part of the clause which vacates the policy if the premises should, at the time of any fire, be occupied for purposes more hazardous than at the date of the instrument, should be understood as merely identifying the description and condition of the property at that time, for the standard of comparison in case of fire; that no other force or effect was intended to be given to the writings referred to, than as being a description of the nature or purposes of the occupation of the building at that time; and that as the clause points expressly to the sort of variance against which it intends to guard (*viz.*, a more hazardous occupation), and declares expressly the consequence of such variance, these declarations should be regarded as expressing the entire scope and object of the reference, beyond which it cannot be carried without violating the apparent intention of the parties. The entire clause, including the reference to the application and the survey, was intended to secure the insurers from loss by a change in the occupancy of the premises which should increase the risk, and not to bind the other party to the truth of immaterial statements not affecting the risk, nor to preclude him from changes either in the plan or occupation of the premises, unless the hazard should be thereby increased. And the written application and survey were referred to as fixing the standard of comparison, and not for the purpose of creating or evidencing any covenant or warranty on the part of the insured, as to the condition or occupation of the premises at the time the insurance was made. The only covenant or warranty on this

subject is contained in that part of the policy which describes the building as a mansion-house situated, &c., and states that it was then occupied as a dwelling-house.”¹

§ 164. It thus becomes apparent that, though the statements and stipulations on the part of the insured are inserted, or are referred to, in the policy itself, it often becomes difficult to determine whether they are warranties or representations. They are not necessarily warranties because they appear on the face of the policy. In order to have the force of a warranty, the statement must indeed constitute a part of the contract; but it by no means follows that every statement which constitutes a part of the contract is therefore a warranty. Whether they are so or not will depend upon the form of expression used, the apparent purpose of the insertion, and sometimes upon the connection or relation to other parts of the instrument. So, also, if the statements contained in a separate paper are referred to and made part of the contract, yet if the reference appear to be made for a special purpose, and not with a view to import the separate paper into the policy as a part of the contract, the statements will not thereby be transformed from representations into warranties. Warranties can only exist upon the fair interpretation and clear intentment of the words of the parties, and, since courts will not favor warranties by construction, they will not be bound when, from the form of the expression used, or other reason, there appears to be no intention to enter into them. Parties will not be held to have entered into the contract of warranty

¹ Kentucky and Louisville Mut. Ins. Co. v. Southard, 8 B. Mon. 637. And the statute of Massachusetts (Stat. 1864, c. 196, § 1), which is as follows: “In all insurance against loss by fire hereafter made by companies chartered or doing business in this Commonwealth, the conditions of the insurance shall be stated in the body of the policy, and neither the application of the insured nor the by-laws of the company shall be considered as a warranty or part of the contract except so far as they are incorporated in full in the policy, and so appear on its face before the signatures of the officers of the company,” was but a legislative expression of the judicial tendency at that time. And now the courts seem to have addressed themselves to the question how far what is expressly stated in the policy, and is made part of the contract, is necessarily a warranty, with the evident disposition to restrict this effect of such an express statement in the policy to material and substantial matters affecting the risk.

unless they clearly intended it; and if the reference in the policy to statements contained in another paper do not clearly show that the reference is made for the purpose of giving to the statement so referred to the force and effect of warranties, as if they be referred to as "statements" or "representations," or if the reference appear to be made for another purpose, or if the purpose be doubtful, such reference will not convert the statements into warranties.¹ In *Houghton v. Manufacturers' Mutual Fire Insurance Company*,² it was held that though the application was by reference made part of the policy, yet as the statements in the application were referred to as representations, and so denominated in that clause of the policy which referred to them, they were to be treated as such, and to be regarded rather as having the legal effect of representations than of warranties, as understood in the law of marine insurance, though partaking in some measure of the character of both. They are like representations in requiring that the facts stated shall be substantially true and correct, and, so far as they are excentory, that they shall be substantially complied with; but not like warranties in requiring an exact and literal compliance. And when it is said, as it sometimes, indeed, not unfrequently, is, that the statements in an application referred to as forming a part of the policy are by that reference imported into the policy and become warranties, and, like warranties, must be literally true and exactly complied with, it is apparent from the cases just cited, and from many others, that the language of the courts in their assertion of the rule is somewhat more positive and vigorous than is justified by the manner in which the rule, thus strongly and positively asserted, has been illustrated by practical application. In truth, the courts have apparently begun to see that they have

¹ *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381; *Miller v. Mut. Benefit Life Ins. Co.*, 31 Iowa, 216; *Blood v. Howard Ins. Co.*, 12 Cush. (Mass.) 472; *Towne v. Fitchburg Ins. Co.*, 7 Allen (Mass.), 51; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72; *Snyder v. Farmers' Ins. and Loan Co.*, 13 Wend. (N. Y.) 92; *Wilson v. Conway*, 4 R. I. 141; *Stebbins v. Globe Ins. Co.*, 2 Hall (N. Y. Superior Ct.), 632; *Kentucky and Louisville Mut. Ins. Co. v. Southard*, 8 B. Mon. (Ky.) 634.

² 8 Met. (Mass.) 114.

gone far enough under the lead of arbitrary rules, in finding constructive warranties, in the immaterial, unguarded, and oftentimes superfluous statements contained in the application.¹

§ 165. The case of *Campbell v. New England Mutual Life Insurance Company*² was cited and approved (after quoting from it largely) in *Price v. Phoenix Mutual Life Insurance Company*,³ upon the point that statements contained in the application will not be held to be warranties, whether referred to and made part of the policy or not, if elsewhere in the contract there can be found reason to suppose that such was not the clear understanding and intent of the parties, and seems to have been regarded, not justly as it seems to us, by the court in the latter case as irreconcilable with prior cases in Massachusetts. It was, however, justly regarded as very decisively indicating the purpose of that court to confine constructive warranties within stricter limits, and beyond question as irreconcilable with numerous *dicta* both in that court and others, which have often had too much influence in deciding adjudged cases. In the latter case there was no material respect, upon the point under consideration, in which the contract differed from that in the Massachusetts case, the court regarding the fact that in one case the statement was made "the basis of the policy," while in the other the policy was declared to be issued "upon the faith" of the statements as immaterial. And independently of the authority of that case, as the result of a "painstaking examination," the court arrived at a clear conclusion that what the parties themselves designate as "representations," "declarations," or "statements" cannot be converted into warranties by being imported into, and made part of, the contract; and they cite with approval the following judicious observations of Mr. Philips:⁴ "The cases would have presented few difficulties of construction if the early jurisprudence had been less open to the

¹ *Boardman v. N. H. Mut. Fire Ins. Co.*, 20 N. H. 557; *Hough v. City Fire Ins. Co.*, 29 Conn. 10.

² 98 Mass. 381.

³ *Sup. Ct. Minn.*, 2 Ins. L. J. 253.

⁴ 1 Ins. § 638.

admission of forfeitures of the policy, and more easily satisfied with a compliance with written stipulations substantially equivalent to a literal one, when such a construction was not inconsistent with the express provisions of the contract. The recent jurisprudence tends to greater liberality of construction in favor of maintaining the contract. Such a rule may as well be applied to stipulations and recitals in the policy as to representations preliminary and collateral to it; and it is more equitable after the policy has gone into effect, and the underwriter has a right to retain the premium, that the contract should be continued in force as long as its being maintained is consistent with its express provisions, and the underwriter is not thereby prejudiced." In those States where the principles of equity are to a considerable extent adopted and enforced in the courts of common law these observations have a special application.

§ 166. Where the language of the questions contained in the application is ambiguous, so as to admit of different answers, if the insured answer in good faith in some proper sense, and when the application is unintentionally defective in a matter known to the insurers or their agent, the insured will be excused though he do not give the desired answer.¹ And though the insured do not answer certain questions at all, and give a negative answer to a general question as to his knowledge of any other circumstances affecting the risk, such answer cannot be made applicable to another question in the same application, which is unanswered, but which if negatived would be untruly answered; nor will the failure to answer at all vitiate the policy. The issuing of a policy or an application which contains no answer to certain questions is a waiver of answer to those questions, and to avoid the policy in such cases the insurers must prove untrue statements other than those inquired about.²

§ 167. The recital in the policy that it is based upon an

¹ *Wilson v. Hampden Fire Ins. Co.*, 4 R. I. 159; *Campbell v. Merchants' and Farmers' Mut. Fire Ins. Co.*, 37 N. H. 35; *Cumberland Valley Mut. Prot. Co. v. Schell*, 29 Penn. St. 31.

² *Liberty Hall Ass. v. Housatonic Mut. Fire Ins. Co.*, 7 Gray (Mass.), 261.

application does not make the application essential. A policy so stating, but issued without any written application, is as valid as if issued upon the written application.¹ Nor is the insured bound by the statements contained in an application, of the contents of which he has no knowledge, and which he has never signed, and which does not purport to be made by him or in his behalf, merely because the policy recites that "the contract is made and accepted with reference to the survey on file."² Otherwise, if the policy be obtained by an agent authorized to procure it.³

§ 168. **Application may limit and control the Language of the Policy.**— If the policy provides that if any statement contained in the declaration (which is made part thereof) be untrue, the policy shall be void, and the declaration itself proceeds to say that the particulars "are correct and true throughout," and if it shall hereafter appear that "any fraudulent concealment or designedly untrue statement be contained therein," *i.e.*, in the above-written particulars, the policy shall be void, not every untrue statement, but only a designedly untrue statement will avoid the policy. The two clauses, parts of the same instrument, must be taken together, and if any doubt arises as to their construction, that doubt must be construed against the insurers who prepared the instrument.⁴ "The declaration," says Cockburn, C. J., in giving his opinion, "is 'that the particulars given in answer to the question propounded by the company are correct and true throughout;' that the proposal and declaration shall be the basis of the contract. 'And if it shall hereafter appear that any fraudulent concealment or designedly untrue statement be contained therein, then all the moneys which shall have been paid on account of the assurance made in consequence hereof shall be forfeited, and the policy granted in respect of such assurance shall be absolutely null and void.' It is sought, on the part

¹ *Blake v. Exch. Mut. Ins. Co.*, 12 Gray (Mass.), 265.

² *Denny v. Conway Stock and Mut. Ins. Co.*, 13 Gray (Mass.), 429.

³ *Draper v. Charter Oak Fire Ins. Co.*, 2 Allen (Mass.), 569.

⁴ *Fowkes v. Manchester and London Life Ass. and Loan Assoc.*, 3 B. & S. (Q. B.) 917.

of the defendants, to construe this declaration in the disjunctive, so that not only if any fraudulent concealment or designedly untrue statement is contained in the answers to the question the policy is to be void and the premiums forfeited, but that if any incorrect or untrue statement, however honestly and sincerely made in the belief of its truth, occur in those answers, the same consequences are to follow. The first observation in answer is that, upon that construction, the clause which relates to fraudulent concealment, and designedly untrue statement, is superfluous and unnecessary, because it is only a reiteration *in extenso* of that which is involved in the former clause, which requires the particulars to be correct and true. In construing an instrument prepared by the company, and submitted by them to the party effecting the insurance for his signature, it ought to be read most strongly, *contra proferentes*; and inasmuch as, upon the construction contended for, the latter clause is wholly unnecessary, I think we ought to construe that clause as merely explanatory of what is meant by "correct" and "true" in the former clause. "A layman about to effect an insurance would read such a document, when submitted to him for his signature, in the following sense: 'I agree that my answers to the questions propounded to me by the company shall be the basis of the contract between us; that is to say, if I am guilty of any fraudulent concealment, or designedly untrue statement in those answers, the policy shall be null and void, and not only that, but the premiums shall be forfeited.'

"Then it is said that, if we turn from the declaration to the policy, we shall find that the language of the policy varies from the declaration; and it is argued that the policy is the true statement of the contract between the parties. But the declaration is declared to be as much a part of the policy as if it had been set forth therein; and the language of the policy is, that if any statement in the declaration is "untrue," the policy shall be void, and all moneys paid in respect thereof be forfeited. To ascertain the meaning of the words, "if any statement in the declaration is untrue," we must refer to the declaration itself, which is made the basis of the contract;

and reading those words with the light thrown upon them by the language in the declaration, I think the true construction of the language of the defendants is, that, in order to avoid the policy, the statement must be designedly untrue; that is, untrue to the knowledge of the assured."

§ 169. In further illustration of this point may be cited the very recent case of *Washington Life Insurance Company v. Harney*,¹ where the opinion of the court, upon this point, was as follows:—

"The policy was issued and accepted by the assured upon the following amongst other express conditions and agreements, to wit, 'If any of the statements or declarations made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue.' . . . 'Then in every such case the said company shall not be liable for the payment of the sum insured, or any part thereof, and this policy shall be null and void.' We do not understand the clause, 'upon the faith of which this policy is issued,' as limiting this condition to a portion of the application, or any particular statements therein. It does not mean to imply that there are certain statements which must be true because the policy is based upon them, while others are immaterial. It means that the policy is issued upon the faith of the whole application, with all its statements and declarations, and that if any of them are untrue the policy is avoided. We must therefore consider the application as a whole, and each party has a right to have it so considered. If the application propounds certain questions and indicates in what manner they must be answered, it is enough that they are answered in that manner, and when the policy is based upon the statements and declarations of the application, it is based upon them made in the manner and under the rules laid down by the company in the application. If we turn now to the application we find under the head 'Instructions in filling up this application,' 'First, answer each of the questions on the first page to the best of your knowledge and belief, briefly but explicitly;' and at the close of the questions and answers of

¹ Sup. Ct. Kansas, 2 Ins. L. J. 283.

the applicant, and just before her signature, is the following: 'It is hereby declared that the above are fair and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned that the above statements shall form the basis of the contract for insurance, and also that any wilfully untrue or fraudulent answers, any suppression of facts in regard to the party's health, or neglect to pay the premium on or before the day it becomes due, will render the policy null and void, and forfeit all payments made thereon.' While the policy for its validity requires truthfulness in the statements of the application, it is enough if they are true according to the degree and conditions of truthfulness required by the application. This is all the parties want when they speak of truthfulness in the policy; to presume otherwise, and suppose that the company meant one degree of truthfulness in the application, and another in the policy, is to impute a dishonesty which the law will never presume, and, if shown to exist, will never sustain."

§ 170. While it is true that if a fact be in plain terms expressly warranted, its materiality to the risk is of no importance, and it becomes a condition precedent, although entirely immaterial, yet where a circumstance is sought to be included by implication in the warranty, it never can be supposed that the parties intended to include it, unless it be manifestly material to the risk.¹ In this way the question of materiality may sometimes arise, even under a warranty, or rather as aiding in determining the question whether what appears to be, and in point of form is, a warranty, is so in point of fact. Thus in *Anderson v. Fitzgerald*,² where the policy was to be void "if any false statement in or about the effecting or obtaining that insurance" were made, it was said by Parke, B.: "It is true that the materiality of these statements may be sometimes evidence of the purpose with which they were made, and may tend to show that they were made with the object of obtaining the policy, because if immaterial they would not be likely to affect it; but the materiality is not a necessary con-

¹ *O'Neil v. Buffalo Fire Ins. Co.*, 3 Comst. (N. Y.) 122.

² 4 H. of L. Cas. 434.

dition to bring them within the scope of the proviso, if it be shown that the statements were made in obtaining the policy and for the purpose of effecting it." A warranty will in no case be extended by construction, nor will it be made to include any thing not clearly within its terms.¹ And it will be construed strictly against those for whose benefit it is made, when it imposes burdens upon others ;² and so, if possible, as to avoid a forfeiture.³ When, however, the truth of all the statements in the application is made a condition precedent, the reciting a portion of them only in the policy will not have the effect to reduce those not recited from the quality of warranties to that of representations.⁴ And where a policy insures the holder against death or injury by "violent and accidental means within the meaning of this contract and conditions," and the conditions annexed specify certain modes of injury or death which the policy did not cover, this exclusion does not operate to enlarge the scope of the words "violent and accidental means," so as to include all modes of injury and death by violence and accident not embraced in the exclusion, or any modes not fairly within the meaning of the words.⁵ But statements and stipulations not required by the conditions of the contract, though the writing containing them is by the conditions made part of the policy, do not constitute warranties. They are not necessary, but voluntary statements and stipulations, and if material have the force of representations.⁶

§ 171. **Warranties and Representations construed strictly as to their Scope.** — Warranties and representations will also be construed strictly as to their scope. Thus a warranty that a room is warmed by a stove, and that the pipe is well secured, is only a warranty that it is so warmed when warmed at all, and that the pipe is so secured when the stove is used, but not at other times.⁷ So a warranty that the water-tanks shall be at all

¹ *Blood v. Howard Fire Ins. Co.*, 12 Cush. (Mass.) 472; *Shepherd v. Union Mut. Fire Ins. Co.*, 38 N. H. 232.

² *Catlin v. Springfield Fire Ins. Co.*, 1 Sum. (U. S. C. C.) 434.

³ *Ripley v. Aetna Ins. Co.*, 29 Barb. (N. Y.) 552.

⁴ *Secales v. Scanlan*, 6 Irish (Law), 367.

⁵ *Southard v. Railway Passengers Assurance Co.*, 34 Conn. 574.

⁶ *Protection Ins. Co. v. Harmer*, 22 Ohio (2 Ohio St.), 452.

⁷ *Loud v. Citizens' Mut. Ins. Co.*, 2 Gray (Mass.), 221.

times well supplied with water, as applicable to a building in process of construction, means that the tanks shall be built and filled with reasonable diligence in the course of construction.¹ So a warranty of force-pumps, ready for use, includes a warranty that there is some power to work the pumps; but it is not a warranty that that power is the best, or the usual, or of any particular kind; nor that the pumps shall not be disabled by the fire.² And a representation that there is a force-pump does not by implication include hose. The truth of the representation is completely established by the fact that there is a force-pump, and whether hose or buckets are the means by which the water delivered by the pump is made available in case of fire, not being inquired about, is immaterial.³ So a warranty that the property belongs to the insured is not a warranty of any particular title, or that it is unincumbered.⁴

§ 172. **Contracts of Insurance interpreted by the same Rules as other Contracts.**—It may be well to observe here, because there are unconsidered suggestions to the contrary, that the principles of interpretation applicable to contracts of insurance are the same as those which obtain in the case of other contracts. It is likewise to be observed, that while marine insurance was the earliest, and, till within a comparatively recent period, the almost exclusive form under which this contract came under the observation of the courts, and upon this form is based substantially that body of principles known as the Laws of Insurance, all the other forms of insurance are the outgrowth of this earliest and primitive form, and are but new adaptations and applications thence elaborated, subject only to such modifications as were required by the peculiarities of the new risks assumed, and the new interests to be protected. The doctrines of marine insurance are therefore always to be resorted to and applied in the elucidation of all other kinds, unless the express provisions of the contract, or

¹ Gloucester Manuf. Co. v. Howard Fire Ins. Co., 5 Gray (Mass.), 497.

² Sayles v. North Western Ins. Co., 2 Curtis (C. C. U. S.), 612.

³ Peoria Mar. and Fire Ins. Co. v. Lewis, 18 Ill. 553.

⁴ Mut. Ins. Co. v. Deale, 18 Md. 26.

circumstances peculiar to the subject-matter, render them inapplicable, or require their qualification in order to accomplish the object for which the contract is entered into.

§ 173. **How far Proof of Usage is admissible in aid of Interpretation.**—In the early history of insurance many terms and phrases were used of doubtful meaning which required a reference to usage for the purpose of explanation. And so numerous were these doubtful terms and phrases, and so frequent was the reference to custom and usage to explain them, that so great a judge as Mr. Justice Buller is reported to have said that “in policies of insurance in particular a great latitude of construction as to usage has been admitted. By usage places come within the policy which are not expressed in words. Usage not only explains but even controls the policy.”¹ “In all matters of trade, usage is a sacred thing.”² But if that learned judge meant any thing more by these expressions than that great frequency of resort to usage for the purpose of explaining ambiguities is had, he was doubtless, by some peculiarity of the cases under consideration, betrayed into unguarded expressions, not apt to fall from him, and not warranted either by the earlier or later decisions. Nevertheless the authority of so great a man gave vogue to the impression that in this respect contracts of insurance were in some sort excepted out of the general rules applicable to other contracts. But nothing is better settled than that this impression is without foundation. The same rule of construction which applies to other instruments applies also to these. They are to be construed according to the sense and meaning of the terms used; and if these are clear and unambiguous, the courts will not admit parol evidence to contradict, vary, or explain them. Their terms are to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense, distinct from the popular sense, rendering it necessary to resort to extrinsic proof in order to determine in which sense they are used, and so to

¹ Long v. Allen, cited in Park, 390.

² Newman v. Cazalet, also cited in Park, 414, note.

explain their ambiguity, or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties, be understood in some special and peculiar sense.¹

A policy of insurance is a contract, and is to be governed by the same principles as govern other contracts. When it is said that a contract of insurance is a contract *uberrimæ fidei*, this only means that the good faith, which is the basis of all contracts, is more especially required in that species of contract in which one of the parties to the contract is necessarily less acquainted with the details of the subject of the contract than the other.² Its language, says Nelson, C. J.,³ "is to receive a reasonable interpretation; its intent and substance, as derived from the language used, should be regarded. There is no more reason for claiming a strict literal compliance with its terms than in ordinary contracts. Full legal effect should always be given to it for the purpose of guarding the company against fraud and imposture. Beyond this, we would be sacrificing substance to form, — following words rather than ideas." Indeed, a moment's reflection will render it apparent that there is nothing in an agreement about insurance intrinsically more sacred or inviolable than in an agreement about any other subject-matter.

§ 174. **The Contract will be construed liberally in favor of the Object to be accomplished.** — It was early held, with special reference to contracts of marine insurance, that the *strictum jus* or *apex juris* is not to be laid hold on, but they are to be construed largely for the benefit of trade and for the insured,⁴ — a rule which, under different forms of expression, has obtained with reference to all kinds of insurance to the present day. Having indemnity for its object, the contract is to be construed

¹ Per Lord Ellenborough, *Robertson v. French*, 4 East, 135. And see *post*, § 179.

² Lord Abinger, C. B., in *Cornfoot v. Fowke*, 6 Mees. & Wels. 358, in reply to the suggestion of Sir Frederic Thesiger, *arguendo*, on a question of representation that a greater degree of good faith is required in contracts of insurance than in others.

³ *Turley v. North Am. Fire Ins. Co.*, 25 Wend. 374.

⁴ *Tiernay v. Ethrington*, 1 Burr. 341.

liberally to that end, and it is presumably the intention of the insurer that the insured shall understand that in case of loss he is to be protected to the full extent which any fair interpretation will give.¹ The spirit of the rule is, that where two interpretations equally fair may be given, that which gives the greater indemnity shall prevail. And to the same spirit is due the rule that conditions and provisos will be strictly construed against the insurers because they have for their object to limit the scope and defeat the purpose of the principal contract;² and apparently contradictory clauses will be so construed if possible as to reconcile them with each other, and to give to each its due force in furtherance of the main purpose of the contract.³ Of course the different provisions of the contract must be so construed, if possible, as to give effect to each. If, therefore, the natural and obvious interpretation of one would render it nugatory, or bring it into conflict with another, while a different interpretation would reconcile the two, and give force and effect to both, the latter is to be adopted. So if the natural interpretation, looking to the other provisions of the contract, and to its general object and scope, would lead to an absurd or unreasonable conclusion, as such a result cannot be presumed to have been within the intention of the parties, such interpretation must be abandoned, and that adopted which will be more consistent with reason and probability.

§ 175. Language taken most strongly against those for whose Benefit it is.—No rule, in the interpretation of a policy, is more fully established, or more imperative and controlling, than that which declares that, in all cases, it must be liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim to the indemnity, which in making the insurance it was his object to secure. When the words are, without violence, susceptible of two interpretations, that which will sustain his claim and cover the loss must, in pref-

¹ *Dow v. Hope Ins. Co.*, 1 Hall (N. Y. Superior Ct.), 174.

² *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405.

³ *Merchants' Ins. Co. v. Edmond*, 17 Gratt. (Va.) 138.

erence, be adopted.¹ While courts will extend all reasonable protection to insurers, by allowing them to hedge themselves about by conditions intended to guard against fraud, carelessness, want of interest, and the like, they will nevertheless enforce the salutary rule of construction, that as the language of the conditions is theirs, and it is therefore in their power to provide for every proper care, it is to be construed most favorably to the insured.² Thus, if a stipulation be ambiguous, and no light can be thrown upon it in accordance with the received principles of law, from extrinsic evidence, the doubt is to be resolved against the party by whom and in whose favor the stipulation is made. The words of a promise, with its exceptions and qualifications, are to be considered as those of the promisor, while those of a representation on which the promise is founded are the words of the promisee. If a question be equivocal, so that it is susceptible of being answered in more than one way, and differently from different points of view, it will not be open to the company which prepares the question to object that it is not answered in the true sense.³ Thus the question whether one has suffered any serious injury might be answered in the affirmative if regarded in the light of the severity of the suffering, and temporary inconvenience occasioned at the time. But looked at afterwards, and after a permanent and complete recovery, it may well be answered in the negative, so far as the injury is material to the question of the value of a life risk.⁴ So an incidental communication from the insurer to the insured will be deemed to contain not only all the language expresses, but all that can be fairly deducible therefrom in the light of the circumstances under which it is made. Thus if notice of additional insurance and an approval in writing by the insurers be required, an acknowledgment in writing that notice has been received,

¹ *Westfall v. Hudson River Fire Ins. Co.*, 2 Duer (N. Y. Superior Ct.), 490.

² *Cropper v. Western Ins. Co.*, 32 Penn. St. 351.

³ *Cropper v. Western Ins. Co.*, 32 Penn. St. 351; *Wilson v. Hampden Fire Ins. Co.*, 4 R. I. 150; *Ætna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242; *Bartlett v. Union Mut. Fire Ins. Co.*, 46 Me. 500; *Wilson v. Conway Ins. Co.*, 4 R. I. 141.

⁴ *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222.

without more, will be deemed an approval.¹ So words of exception, if of doubtful import, are to be construed most strongly against the party in whose interest they are introduced.²

§ 176. An instance of the application of the doctrine that where there is any ambiguity in a policy it must be taken most strongly against the party who prepares it, is well illustrated in a comparatively recent case. The proposal or declaration is made the basis of the contract and part of the policy, affirms that its particular statements are "correct and true throughout," and stipulates that if it shall hereafter appear that any fraudulent concealment or designedly untrue statement is made, the policy shall be void. It was contended by the insurers that by this language the policy was to be void not only upon an untrue statement designedly made, but also upon an untrue statement honestly made. But the court replied that upon that construction the clause which relates to designedly untrue statements would be superfluous, because only a reiteration of that which is involved in the former clause requiring the particulars to be correct and true. But in construing an instrument prepared by the insurers, it ought to be read most strongly against the makers, and inasmuch as, upon the construction contended for, the latter clause would be wholly unnecessary, it should rather be construed as merely explanatory of what is meant by the terms "correct" and "true" in the former clause.³

§ 177. **Written over printed Words prevail.** — As in all contracts consisting partly of printed matter and partly of written, so with contracts of insurance, where any discrepancy or repugnancy exists, the written portion is to prevail over the printed, for the obvious reason that as the latter contains the more general and formal provisions applicable for the most part to all cases, there is more ground for supposing that these

¹ *Potter v. Ontario and Liv. Mut. Ins. Co.*, 5 Hill (N. Y.), 147; *Robertson v. French*, 4 East, 135.

² *Palmer v. Warren Ins. Co.*, 1 Story (U. S. C. Ct.), 360; *Blackett v. Royal Ex. Ins. Co.*, 2 Cromp. & Jer. 244.

³ *Fowkes v. Manchester and London Life Ass. Association*, 3 Best & Smith, Q. B. 917; s. c. E. C. L. 113, 917.

have not been erased or modified so as to conform to the written portion, through inadvertence, than that the special and peculiar provisions of the written portion have been adopted without due consideration, and inserted without the design or contrary to the intention of the parties.¹ The printed forms are calculated for ordinary risks, and contain the provisions and conditions usually attached to insurances upon them. They must, therefore, necessarily be general and comprehensive in their terms, and not suited to insurances upon other and special hazards. It is the ordinary course that upon each application a special agreement is made between the applicant and underwriter, designating and describing the premises required to be insured, and fixing the terms of that particular insurance; and the policy is then completed by filling up the blank spaces left in the printed form with suitable words and clauses to express the contract thus agreed upon. This is the usual mode of consummating the contract, and not unfrequently the printed form of the policy is left unaltered, without expunging or modifying the parts of it which conflict with the written clauses. These written clauses, nevertheless, contain the elements of the contract, and being framed under the immediate eye of the parties, and with special reference to the exigencies of the particular contract, and to the terms agreed upon, they sometimes present a contract to which some of the printed parts of the policy are inapplicable. And as effect must be given to the acknowledged intentions of the parties, these written clauses must necessarily supersede and control such of the printed clauses as would, if enforced and literally applied, be inconsistent with them.²

§ 178. **Insurers confined to the exact Words of the Warranty.**—The strictness with which courts will hold insurers seeking to set up a warranty, a breach of which works a forfeiture, is well illustrated by the following cases: The application and conditions annexed were referred to and made part of the policy. The insurance was upon a “stock of merchan-

¹ Robertson v. French, 4 East, 135.

² Delonguemare v. Tradesmen's Ins. Co., 2 Hall (N. Y.), 622; Colt v. Commercial Ins. Co., 7 Johns. (N. Y.) 390.

dise." In the application to the question, "For what purpose is the building used?" it was answered, "Wholesale and retail hardware;" and to the question, "How many tenants?" the answer was, "One." In fact, the second story of the building was occupied as a clothing-store, and the upper story for lodging-rooms. The insured covenants that the representation given in the application is a warranty, and contains a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, and value of the property insured, and if facts or circumstances shall not be fairly represented, then the policy is to be void. In the policy, also, insurance is said to be on the property described in the application, which is referred to and made part of the policy, and declared to be a warranty. And it was held that while the policy would be void if the representations relating to the property insured were untrue, yet that false representations as to matters outside and independent of the property insured, and which had not in any degree contributed to the loss, would not avoid the policy; and as the stipulations both in the application and in the policy have reference to the property insured, and in respect to this there was no untruthfulness, a false representation as to the occupancy of the building which was not insured did not avoid the policy.¹ In another case, the insurance was upon a "stock of goods and merchandise," with a stipulation that if the "premises" be "appropriated, applied, or used for the purpose of storing or keeping therein," amongst other things, "oil and cotton," the policy should be of no effect during such use. A barrel of oil, with bunches of cotton near it, had been kept in the back part of the store for a short time previous to the fire. But it was held that the clause by its terms was confined to the case of a building insured, — a case not covered by the policy; and if the case had been covered by the policy it should have been construed to forbid the appropriation or chief use of the building for any of the prohibited purposes, and not the incidental keeping of small quantities of prohibited articles for retail, along with a general

¹ Howard Fire and Mar. Ins. Co. v. Cormick, 24 Ill. 455.

stock of goods.¹ So an alteration in the status of the property insured, the same not being a building, as for instance the machinery in a building, is not an alteration in the "premises" insured such as will work a forfeiture.² And to prevent a forfeiture by such a breach of warranty, a bare, literal, and technical compliance on the part of the insured with the terms of the contract will sometimes be held to be sufficient, — a compliance which is nearly tantamount to an evasion. Thus under a warranty that mills are worked by day only, keeping up the fires and running the engine by night, the machinery not being attached, would constitute no breach.³

§ 179. *Custom and Usage as Aids to Interpretation.*— We have just seen⁴ that usage is not unfrequently, especially in marine insurance, resorted to in aid of interpretation. But having due regard to the incidental differences in the various kinds of risks, the rules under which evidence of custom and usage is admissible in aid of the interpretation of marine insurances, are equally applicable to all the other kinds of insurances, and have been so well stated by a learned author,⁵ that we take pleasure in transferring them to these pages. They are as follows:—

1. Every usage of a particular trade, which is so well settled or so generally known that all persons engaged in that trade may be fairly considered as contracting with reference to it, is considered to form part of every policy, designed to protect risks in such trade, unless the express terms of the policy decisively repel the inference.

2. The usage, moreover, in order to be binding, must be either a general usage of the whole mercantile world, or a particular usage of universal notoriety in the trade upon which, and of the place at which, the insurance is effected; the usage of a particular place, or of a particular class of per-

¹ *Leggett v. Ætna Ins. Co.*, 10 Rich. Law (S. C.), 202.

² *Robinson v. Mercer County Mut. Ins. Co.*, 3 Dutch. (N. J.) 135.

³ *Mayall v. Mitford*, 6 Ad. & El. 670; *Hide v. Bruce*, 3 Doug. 213; *Peoria Mar. and Fire Ins. Co. v. Lewis*, 18 Ill. 553.

⁴ *Ante*, § 173.

⁵ *Arnould on Insurance*, 65 *et seq.*

sons, cannot be binding on non-residents, or on other persons, unless they are shown to have been cognizant of it.

3. Where the sense of the words and expressions used in a policy is either ambiguous or obscure on the face of the instrument, or is made so by proof of extrinsic circumstances, parol evidence is admissible to explain by usage their meaning in the given case.

4. A resort to parol evidence, however, is only permitted where the language of the policy is either obscure or equivocal; such evidence will never be admitted to set aside or control its plain and unambiguous terms.

Thus, proof is admissible that camphene is customarily used in printing establishments to clean type;¹ or that benzole is so used in patent-leather factories, and is handled in a particular way;² or that amongst manufacturers "room" means "loft," whether the loft be partitioned into distinct apartments or not;³ or that a house built in a certain manner is by usage treated as a house "filled in with brick;"⁴ and, generally, of the meaning of any particular term which has in any trade secured a limited or special meaning, different from its popular acceptance, when the term is used in a contract with a person engaged in that trade.⁵

§ 180. To these may be added another rule, to wit, that proof, whether of a local or general usage, cannot be resorted to for the purpose of importing into the contract a new and distinct condition. Thus a usage that, in case of the occurrence of any circumstance by the act of the insured, after effecting the insurance, whereby the risk is increased, he shall give notice thereof to the insurer, that the latter may then elect to continue or annul the policy, cannot be received in evidence, there being no stipulation in the policy requiring such notice.⁶ Nor when the contract is to pay all loss or damage by fire is it

¹ *Harper v. City Ins. Co.*, 1 Bosw. (N. Y. Superior Ct.) 520.

² *Citizens' Ins. Co. v. McLaughlin*, 53 Penn. St. 485.

³ *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416.

⁴ *Fowler v. Aetna Fire Ins. Co.*, 7 Wend. (N. Y.) 270.

⁵ *Wall v. Howard Ins. Co.*, 14 Barb. (N. Y.) 383.

⁶ *Stebbins v. Globe Ins. Co.*, 2 Hall (N. Y.), 632.

permissible to show that reinsurers are accustomed to pay only such proportion of the loss as is shown by the relation which the amount reinsured bears to the whole amount insured.¹ Nor where the stipulation is to keep a watch nights, can a usage be shown to except certain nights.² But the custom of other similar establishments may be shown to explain what is "keeping a watch."³ And in a case where a building was torn to pieces by lightning but not burned, and the company was liable for losses "by fire by lightning," evidence of the general practice in other insurance companies in similar cases, not to pay where there is no burning, was held admissible, in aid of the interpretation of the phrase.⁴

¹ *Hone v. Mut. Safety Ins. Co.*, 1 Sandf. (N. Y. Superior Ct.) 137; s. c. affirmed, 2 Comst. (N. Y.) 235.

² *Ripley v. Aetna Fire Ins. Co.*, 30 N. Y. 136.

³ *Crocker v. People's Mut. Ins. Co.*, 8 Cush. (Mass.) 79.

⁴ *Babcock v. Montgomery County Mut. Ins. Co.*, 6 Barb. (N. Y.) 637; s. c. affirmed, 4 Comst. (N. Y.) 326.

CHAPTER VII.

OF REPRESENTATION.

§ 181. *Representation defined.* — A representation is a statement incidental to the contract, relative to some fact having reference thereto, and upon the faith of which the contract is entered into. If false and material to the risk the contract is avoided. Such a false statement is termed in insurance a misrepresentation, which has been well defined to be the statement of something as fact which is untrue in fact, and which the insured states knowing it to be untrue, with the intent to deceive the insurers, or which he states positively as true without knowing it to be true, and which has a tendency to mislead, — such fact, in either case, being material to the risk and adverse to the insurers.¹

The general doctrine undoubtedly is, that a misrepresentation, whether made intentionally, or through mistake, and in good faith, avoids the policy, on the ground that, in either case, the injury to the insurer is the same. It is the fact that the insurer relies upon the truth of the representation, and not upon the intention, which misleads, whether fraudulent or otherwise, that gives him the right to complain. And the same doctrine has been frequently held with reference to concealment; but perhaps with less reason, as to which, however, we shall see more particularly hereafter.² But a simply untrue statement is not a “palpably fraudulent or untrue” one,³ and good faith is always sufficient, when the policy provides only for truth “so far as is known to the applicant,”⁴ or against “designedly

¹ *Daniels et al. v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416; *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381; *Nicol v. Am. Ins. Co.*, 3 W. & M. (U. S. C. Ct.) 529.

² *Post*, c. 8.

³ *Guinane v. Hope Mut. Life, &c., Soc.*, 7 Irish Jur. o. s. 52.

⁴ *Garcelon v. Hampden Fire Ins. Co.*, 50 Me. 580.

untrue" statements.¹ The responsibility for misrepresentations is not, however, confined to those contained in the application, under a provision that such misrepresentations shall avoid the policy. Any other misrepresentation made at the time is equally fatal.²

§ 182. **Affirmative and Promissory.** — Representations, like warranties, may be affirmative or promissory. The former are those which affirm the existence of a particular state of things at the time the contract of insurance is made and becomes operative. The latter are those which are made by the assured concerning what is to happen during the term of the insurance, stated as matters of expectation, or, it may be, of contract. The one is an affirmation of a fact existing when the contract begins; the other is a promise to be performed after the contract has come into existence. And upon this distinction follows the important consequence that, while material falsity in an affirmative representation will be a complete defence to an action on a policy of insurance, the material falsity of an oral promissory representation without fraud is no defence whatever. And the reason of the distinction is this. The falsehood of the representation of a material fact misleads the insured into a contract which he does not intend to make, and therefore, in contemplation of law, because misled and deceived, does not make. He may therefore set up the fact that he was misled or deceived, as proof that no agreement was ever made, since there was no concurrence of consent upon the same facts. But an oral promissory representation, being an agreement prior in date to the actual contract of insurance, and in its nature such that it cannot be performed until after the contract of insurance has taken effect, cannot be set up to defeat the later contract; for this would be to violate a fundamental rule of evidence, and make the continuance or maintenance of a written contract dependent upon the performance or breach of an earlier oral agreement. If the oral promise be made *malá fide*, and with

¹ Fowkes v. Manchester and Lan. Assur. Assoc., 3 B. & S. 917.

² Wainwright v. Bland, 2 Mad. & Rob. 481; s. c. 1 Mees. & Wels. 32; Abbott v. Howard, Hayes (Irish), 381.

the intention to mislead and deceive, the fraud will have the same effect as the material falsity of an affirmative representation. But if made *bonâ fide* and without intention to mislead or deceive, it cannot be set up to avoid a contract. Only those promissory representations are available for such a purpose which are reduced to writing and made part of the contract, — thus becoming substantially, if not formally, warranties.¹

§ 183. **Distinction between Warranty and Representation.** — The main distinction between a warranty and a representation — that while the former is "an agreement constituting a part of the contract, the latter is but a statement incidental thereto — is to be carefully observed, as it carries with it important consequences. A warranty enters into and forms a part of the contract itself. It defines by way of particular stipulation, description, condition, or otherwise, the precise limits of the obligation which the insurers undertake to assume. No liability can arise except within those limits. In order to charge the insurers, therefore, every one of the terms which define their obligation must be satisfied by the facts which appear in proof. From the very nature of the case the party seeking his indemnity must bring his claim within the provisions of the instrument he is undertaking to enforce. The burden of proof is upon him to present a case in all respects conforming to the terms under which the risk was assumed. And it must be not merely a substantial conformity, but exact and literal, not only in material particulars, but in those that are immaterial as well. On the other hand, a representation is, in its nature, no part of the contract. Its relation to the contract is usually described by the term "collateral." It may be proved, although existing only in parol and preceding the written instrument. Unlike other verbal negotiations, it is

¹ *Kimball v. Ætna Ins. Co. et al.*, 9 Allen (Mass.), 540; *Same v. Springfield Fire and Mar. Ins. Co.*, ib. This distinction has not met the approbation of some learned writers. See 1 Arnould, Ins., 498; 2 Duer, Ins., 749 *et seq.*; 1 Phil. Ins., § 533. But the opinion by Mr. Justice Gray in the cases cited will be likely to command the assent of the profession. It is a learned, clear, and satisfactory statement of the distinction referred to, and the reasons upon which it rests.

not merged in nor waived by the subsequent writing. This principle is in some respects peculiar to insurance, and rests upon other considerations than the rule which admits proof of verbal representations to impeach written contracts on the ground of fraud. Representations to insurers, before or at the time of making the contract, are a presentation of the elements upon which to estimate the risk proposed to be assumed. They are the basis of the contract: its foundation, on the faith of which it is entered into. If wrongly presented in any respect material to the risks, the policy that may be issued thereupon will not take effect. To enforce it would be to apply the insurance to a risk that was never presented. But where the insurer seeks to defeat a policy upon this ground, his position in court is essentially different from that which he may hold under a policy containing a like description of the risk as one of its terms. It is sufficient for the plaintiff to show fulfilment of all the conditions of recovery which are made such by the contract itself. The burden is then thrown upon the defendant to set forth and prove the untruthfulness of the representations, if there are any such, upon which he relies, and their materiality to the risk.¹

§ 184. Out of this distinction arises the question of materiality. Representations need not, like warranties, be strictly and literally complied with, but only substantially and in those particulars which are material to be disclosed to the insurers to enable them to determine whether they will enter into the contract. In case of warranty the question of materiality does not arise. In case of representation it always does; and if this materiality depends upon facts and circumstances, it is a question for the jury, to be inferred from those facts and circumstances,² as is also the materiality of a concealment.³

¹ *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381; *Miller v. Mut. Benefit Life Ins. Co.*, 31 Iowa, 216.

² *Garcelon v. Hampden Fire Ins. Co.*, 50 Me. 580; *Mut. Ins. Co. v. Deale*, 18 Md. 26; *Keeler v. Niagara Fire Ins. Co.*, 16 Wis. 523; *Farmers' Ins. and Loan Co. v. Snyder*, 16 Wend. (N. Y.) 481; *Daniels et al. v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416; *Franklin Ins. Co. v. Coates*, 14 Md. 285.

³ *Tyler v. Ætna Ins. Co.*, 12 Wend. (N. Y.) 507; *Protection Ins. Co. v. Harmer*, 22 Ohio (2 Ohio St.), 452; *Ins. Co. v. Chase*, 5 Wall. (U. S.) 509;

§ 185. **Question and Answer conclusive as to Materiality.**— But when the representations are in writing, and the parties, by the frame of the contents of the papers, either by putting representations as to the history, quality, or relations of the subject insured into the form of specific questions, or by the mode of referring to them in the policy, settle for themselves that they shall be deemed material, they are to be declared so by the court, and the insured cannot be permitted to show that a fact which both parties have treated as material is in fact immaterial. The inquiry shows that the insurer considers the fact material, and an answer by the insured affords a just inference that he assents to the insurer's view. The inquiry and answer are tantamount to an agreement that the matter inquired about is material, and its materiality is not therefore open to be tried by the jury.¹ That this materiality is under such circumstances a question for the court, has been frequently decided, especially in cases where untrue answers are given to questions as to title.² Whether certain statements are, or are not, material, is a matter upon which there may be a difference of opinion. Nothing therefore can be more reasonable than that parties entering into a contract of insurance shall determine for themselves what they think to be material. And that determination is conclusive.³

§ 186. **Such Representations construed less strictly than Warranties.**— Representations of this kind, however, differ from warranties in that a substantial compliance with them is sufficient to answer their terms. Whether there has been such

Tesson v. Atlantic Mut. Ins. Co., 40 Mo. 33; *Curry v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535; *Gates v. Madison County Mut. Ins. Co.*, 1 Seld. (N. Y.) 469; *Mut. Ins. Co. v. Deale*, 18 Md. 26.

¹ *Wilson v. Conway Ins. Co.*, 4 R. I. 141; *Chaffee v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 376; *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Miller v. Mut. Benefit Life Ins. Co.*, 31 Iowa, 216; *Leroy v. Market Ins. Co.*, 39 N. Y. 90; *Price v. Phoenix Mut. Life Ins. Co.*, Sup. Ct. Minnesota, 2 Ins. L. J. 223.

² *Locke v. North American Fire Ins. Co.*, 13 Mass. 68; *Strong v. Manuf. Ins. Co.*, 10 Pick. (Mass.) 45; *Fletcher v. Commonwealth Ins. Co.*, 18 Pick. (Mass.) 421; *Draper v. Charter Oak Ins. Co.*, 2 Allen (Mass.), 573; *Towne v. Fitchburg Ins. Co.*, 7 Allen (Mass.), 53.

³ *Anderson v. Fitzgerald*, 4 H. L. Cas. 484.

substantial compliance, that is, whether the representation is in every material respect true, is a question of fact for the jury. But it is not for the jury to say that the representation, though substantially untrue, is nevertheless immaterial. For example: suppose that in answer to a specific question the insured states his age to be thirty years, when in fact he is a month older. It would be proper to submit to the jury whether the answer, though strictly and technically untrue, is not substantially and materially true. The materiality of the variance may properly be considered by the jury in passing upon the truth of the answer. But under this guise they would have no right to pass upon the materiality of the question itself, that being conclusively settled by the act of the parties, by which both must be bound. The substantial truth of the statement they may pass upon; with the materiality of the facts they have nothing to do.¹

§ 187. In a leading case, where the questions were whether the applicant then or theretofore was or had been subject to, or in any way affected by, consumption, bronchitis, spitting of blood, &c., to which the answer was in the negative, the court say: "The only question for the jury on this branch of the case, therefore, was whether these representations were substantially untrue; that is to say, whether at or before the time of making the application the assured actually had either of these diseases or infirmities; and, if they found that he had, the policy was void, and the plaintiff could not recover. Applying this rule to the evidence stated in the report, it was for the jury to decide whether 'chronic bronchitis,' or 'bronchial difficulty,' or any other bodily affection or condition to which the assured was found by them to have been subject, amounted

¹ *Miller v. Mut. Benefit Life Ins. Co.*, 31 Iowa, 216; *Wise v. Mut. Benefit Life Ins. Co.*, 34 Md. 582. In *Equitable Life Ass. Soc. v. Patterson*, 41 Ga. 338, where the policy was to be void upon any false statement respecting person or family, and the insured stated that the woman whose life was insured was his wife, when in fact she was not, as his real wife was alive, though it did not appear that he knew it, it was held that the statement was material if the insured knew it to be false, otherwise not. But this seems to be counter to all the authorities. The materiality does not at all depend upon a knowledge of the truth or falsehood of the facts.

to bronchitis, consumption, disease of the lungs, or some other of the infirmities stated in the application and relied on by the defendants; and whether the spitting of blood by him, if proved to have taken place, was under such circumstances as to indicate disease in his throat, lungs, air passages, or other internal organs. But it was not within the province of the jury, under the guise of determining whether the statements of the applicant were materially false, or untrue in some particulars material to the risk, to find that diseases and infirmities were not material to be disclosed, which the parties had by the form of the contract of insurance and of the contemporaneous written application conclusively agreed to consider material.”¹ So in *Price v. Phoenix Mutual Life Insurance Company*,² where the question was: “Has the party ever had any of the following diseases, naming several, and among others, rheumatism?” and the answer was, “Never.” In that case there was evidence tending to show that the life-insured had had sub-acute rheumatism. There was also evidence in the case tending to show that sub-acute rheumatism is not the *disease* of rheumatism, in the ordinary understanding of the term. There was also evidence tending to show that, technically, and in medical parlance, sub-acute rheumatism is the disease of rheumatism, and that it is generally overlooked as a disease. And the court left it to the jury to say, whether the rheumatism referred to in the question is the *disease* of rheumatism. Any rheumatic affection not amounting to the *disease* of rheumatism, they said, would not be comprehended in its terms, any more than the spitting of blood occasioned by a wound of the tongue, or the extracting of a tooth, is the *disease* of ‘spitting of blood,’ mentioned in the same question. The life-insured had a right to answer the question upon the basis that its terms were used in their ordinary signification. If there was any ambiguity in the question, so that its language was capable of being construed in an ordinary, as well as a technical sense, the defendant can take no advantage from such ambiguity.³ And in the same case, to the question: ‘Has the party

¹ *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381.

² *Sup. Ct. Min. 2 Ins. L. J.* 253.

³ *Wilson v. Hampden Fire Ins. Co.*, 4 R. I. 159.

had, during the last seven years, any severe sickness or disease?" the answer was, "No." The allegation in defence was, that the life-insured had had within seven years *chronic gastritis*. There was evidence tending to show that he had had gastritis; and the court said that unless chronic gastritis and gastritis are synonymous, as to which there is no judicial presumption nor testimony, the evidence was not within the issue, so that the false representation charged was not proved. In addition to this consideration, they were not free from doubt as to whether gastritis was shown to be "a severe sickness or disease." "We can," they said, "take no judicial cognizance of its character. The evidence certainly has a strong tendency to show that it was the result of the excessive use of spirits, and that it was an affection of brief duration.

"We cannot say that the jury might not, upon the evidence, find a warrant for regarding it as a temporary consequence of dissipation, rather than a 'severe sickness or disease,' in the ordinary meaning of those terms."

So if the question be whether the party be employed in the military service, the jury may consider whether the facts proved show an actual employment, but not the materiality of the facts; or if he has had any sickness, they may consider whether the facts proved amount to "sickness," as understood by the parties, but not whether the sickness, if proved, is material; or if the application of the insured has been declined by any company, they may consider whether the facts proved amount to a declination, but not whether the declination is material. The question of materiality is closed by the interrogatory and answer; the question of the truth of the answer is for the jury; and here they have so much latitude as to be allowed to find it to be true, if it is substantially true, though not technically literally or exactly true.¹

§ 188. As another illustration of what is meant by the substantial truth of answers to questions, may be cited the recent case of *Power v. City Fire Insurance Company*,² where the answer was, "There is a watchman when the mill is not in

¹ *Mutual Benefit Life Ins. Co. v. Wise*, 34 Md. 583.

² 8 Phila. Rep. 566.

use." The court, in charging the jury that it was for them to determine if this warranty was strictly kept, say: "Every representation made for the purpose of obtaining an insurance must be strictly and literally true, in the sense that no other state of facts can be taken as an equivalent of it. If it be that there was a watchman, only that fact, and no other amount of equivalent care or cautious arrangements or other guards, can be accepted as satisfying the representation. The representation in the application is a written covenant that it is true, and makes the truth of the answer a condition precedent to any claim upon the insurer. I have felt some inclination to think that the answer was not intended to refer to the nightly suspensions of work in the mill, but only to seasons when the mill was not in use at all, but lying idle. This, however, has not been insisted on, and I do not consider it. I take the insurer to include the case before us, wherein the mill was run during each day and stopped at night. But I cannot say that the answer was intended by the parties as a contract that the insured should always keep a watchman at the mill when it was not going, and that his sole duty during such times should be to watch against fire, always awake, and always present; nor can I say that the law constructs such a contract out of the answer. The answer is very loose in its terms, and the insurers accept it in all its looseness, and then as of little importance, and do not insert it in the policy for the further guidance of the insured, but file it away in their office. It makes no approach to a definition of the function to be performed by the watchman. The word is in its very nature loose and indefinite in its meaning, and the law cannot supply this defect by giving a definition, because it is not a technical term of the law, and because the nature of a watchman's functions varies in different places and according to the dangers to which the property is exposed, and even according to the nature and value of the property. Watchmen are seldom mere watchmen against fire, but almost always against all dangers of whatever kind. Some kinds of danger, and at some times, require constant wakefulness; other kinds, at other times and places, do not. Many, perhaps most persons, guard their

stores, safes, mills, factories, &c. (when they watch at all), by clerks, or hands, who sleep on the premises so as to be at hand when danger arises. A family sleeping in the house is a protection of it. The court cannot declare, as matter of law, what is the proper degree of a watchman's care, implied in this answer, without adding to the contract of the parties. We might as well define a house in a contract for building a house. It is for the jury to say whether or not the plaintiff has strictly and literally complied with his contract to keep a watchman when the mill is not in use."¹

§ 189. **Representation in Part true and part false.** — Where the plaintiff insures for a specific sum on the store, and another specific sum on the stock of goods therein, and gives one note for the premium on both sums, representing them to be his store and goods, when in fact he has no title to the store, the contract being entire, the misrepresentation vitiates it, so that nothing can be recovered for the loss of the goods which were admitted to belong to the insured.² So where the property is represented to be unincumbered, when in fact it is in part covered by a mortgage.³

§ 190. **Effect of Change of Circumstances pending Negotiation.** — A representation is a continuous statement from the time it is made, during the progress of the negotiations, and down to the time of the completion of the contract. So that though in point of fact the representation be true when actually made, yet if by some change intervening between that time and the time of completion of the contract it then becomes untrue, it will avoid the contract if the change be material and to the prejudice of the insurers. The law regards

¹ This case was affirmed on a writ of error to the Supreme Court. See also *North Am. Fire Ins. Co. v. Throop*, 22 Mich. pp. 158 and 159, for some valuable suggestions as to the strictness and precision required in such answers.

² *Day v. Charter Oak Fire and Mar. Ins. Co.*, 51 Me. 91; *Trench v. Chenango County Mut. Ins. Co.*, 7 Hill (N. Y.), 122; *Lovejoy v. Augusta Mut. Fire Ins. Co.*, 45 Me. 472.

³ *Friesmouth v. Agawam Mut. Ins. Co.*, 10 Cush. (Mass.) 587; *Smith v. Empire Ins. Co.*, 25 Barb. (N. Y.) 497; *Gould v. York County Mut. Fire Ins. Co.*, 47 Me. 403. *Contra* in Missouri, *Koonts v. Hannibal Sec. Ass.*, 42 Mo. 126; *Lochner v. Home Mut. Ins. Co.*, 19 Mo. 628. And in Kentucky, *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9.

it as made at the instant the contract is entered into.¹ And the same rule applies in case of concealment. Any change in the state of health of the person or condition of the property to be insured, pending the negotiations, if such changes would naturally have any influence upon the judgment of the insurers, must be made known, as the state of facts existing at the time of the completion of the contract will be deemed to have been the basis of the contract.² And a change from a mild to an aggravated form of the same disease is a change which ought to be disclosed.³ Where renewals are made upon the statements in the original application, whether the truth of the statements is to be tried by the circumstances existing at the time of the renewal, or at the time when the original application was made, is a question upon which the authorities do not agree; some taking the view that a renewal makes a new contract,⁴ and others that it merely continues the old one.⁵ Special circumstances, however, seem to control the decision, according as these circumstances indicate the intent of the parties.

In *Luciani v. American Fire Insurance Company*⁶ the policy was under seal, and the renewals from time to time, not always for the same amount, indorsed on the policy, and the court held that covenant was not the proper form of action; while *assumpsit* perhaps would lie upon the parol continuance of the contract. In some cases it is expressly stipulated that the renewal shall be upon the express understanding that the original representations remain true at the time of renewal.⁷ But where a renewal certificate is taken out, with distinct notice to the insurers that the property returned has

¹ *Trail v. Booring*, 4 Giff. 485; s. c. on appeal, 10 L. T. N. S. 215.

² *British Eq. Ins. Co. v. Great West. Ins. Co.*, 38 L. J. Ch. 132; s. c. on appeal, 20 L. T. N. S. 422; *Calvert v. Hamilton Mut. Ins. Co.*, 1 Allen (Mass.), 308.

³ *Rose v. Med. Ins. and Gen. Life Ins. Soc.*, 11 Ct. of Sess. (Scotch) 2d series, 345.

⁴ *Brady v. North Western Ins. Co.*, 11 Mich. 425.

⁵ *New Eng. Fire and Mar. Ins. Co. v. Wetmore*, 32, 221; *Baltimore Fire Ins. Co. v. McGowan*, 16 Md. 47.

⁶ 2 Whart. (Penn.) 167.

⁷ *Liddle v. Market Fire Ins. Co.*, 29 N. Y. 184.

been removed from the premises described in the policy to other premises, the renewal contract will cover the property insured in its new location. This must have been the intent of the parties, certainly the intent and understanding of the insured, as the insurers must have known; and it was also their intent and understanding, unless they designed to defraud under the guise of the contract, which will not be presumed.¹

§ 191. **Subsequent Changes immaterial.** — But if a warranty or representation be true when the bargain is closed, any usual and ordinary changes subsequent to that time will be inoperative to vitiate the contract unless prohibited, and courts will not favor attempts which are sometimes made to convert an affirmative into a promissory or continuing representation or warranty. Thus when it is represented that a building "is used only for the purpose of meeting of a band during two evenings of the week," the representation applies merely to the then existing use of the building, not to the future use of the property.² So if it be described as an "unoccupied" house, "but to be occupied by a tenant," or in answer to the question about occupation it is said that it "will be occupied by a tenant," this is neither a warranty that it shall continue unoccupied, nor that it shall be occupied, but rather a representation true, if such was the fact, of the existing state of things, and a statement of an expectation that it would be so occupied, with a reservation of the right to have it so occupied; and such statements are not to be treated as limiting the use of property so as to deprive the insured of the enjoyment of it as is usual in such cases.³ So, where it is said that "a clerk sleeps in the store;"⁴ or that "barns are used for hay, straw, shelter, and stabling;"⁵ and, generally, when the

¹ *Ludwig v. Jersey City Ins. Co.*, New York Commission of Appeals, Albany Law Journal, vol. vi. 324.

² *Blood v. Harvard Fire Ins. Co.*, 12 Cush. (Mass.) 472.

³ *Hughes v. City Fire Ins. Co.*, 27 Conn. 10; *O'Neil v. Buffalo Fire Ins. Co.*, 3 Comst. (N. Y.) 122; *Herrick v. Union Mut. Fire Ins. Co.*, 48 Me. 558.

⁴ *Frisbie v. Fayette Ins. Co.*, 27 Penn. St. 325.

⁵ *Billings v. Tolland County Mut. Ins. Co.*, 20 Conn. 139.

statement is as to the employment or habits of a person, or the manner in which a building is occupied or used, or the intentions of the applicant.¹ Such statements are properly to be regarded as descriptive of present status, condition, and expectation, and not as importing a promise as to future use or conduct. If insurers wish to control such use they must do it expressly and by apt words, and not expect the courts to aid them by construction.² So if it is stated in the policy that the adjoining land is "vacant," this does not warrant that it shall continue so, and the insured may erect buildings thereon though the risk to the property insured be thereby increased.³

§ 192. *Oral Statements prior to Application immaterial.* — If a written application be made, it will be presumed to contain the representations which induce the contract, and proof of prior or subsequent verbal statements is inadmissible;⁴ and especially if it be an oral representation as to a future fact, as that a house will be occupied, or will be occupied in a certain way, or not occupied at all, for if it is a mere statement of an expectation honestly entertained, subsequent disappointment will not prove it untrue; and if it is a provision that a certain state of facts shall exist or continue during the currency of the policy, it should be incorporated into the written contract.⁵

¹ *Horton v. Equitable Life Ass. Soc.*, N. Y. City Court of Com. Pleas, Daly, J., 2 Big. Life and Acc. Ins. Cases, not elsewhere reported; *Reichard v. Manhattan Life Ins. Co.*, 31 Mo. 518; *Benham v. United Guaranty and Life Ass. Co.*, 7 Exch. 744.

² *Smith v. Mechanics' and Traders' Mut. Fire Ins. Co.*, 32 N. Y. 399; *Langdon v. N. Y. Equitable Ins. Co.*, 1 Hall (N. Y. Superior Ct.), 226; s. c. 6 Wend. (N. Y.) 623; *Rafferty v. New Brunswick Fire Ins. Co.*, 3 Harr. (N. J.) 480; *Boardman v. Maverick Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 583; *Hall v. People's Mut. Fire Ins. Co.*, 6 Gray (Mass.), 185; *Boardman v. New Hampshire Mut. Fire Ins. Co.*, 20 N. H. 551.

³ *Stebbins v. Globe Ins. Co.*, 2 Hall (N. Y. Superior Ct.), 632.

⁴ *Boggs v. Am. Ins. Co.*, 30 Mo. 63; *Rawle v. Am. Life Ins. Co.*, 27 N. Y. 282.

⁵ *Kimball v. Aetna Ins. Co.*, 9 Allen (Mass.), 540; *Alston v. Mechanics' Ins. Co.*, 4 Hill (N. Y.), 329; *Mayor of N. Y. v. Brooklyn Fire Ins. Co.*, 4 Keyes (N. Y.), 465. The case of *Bilbrough v. Mut. Ins. Co.*, 5 Duer, 587 (N. Y. Superior Ct.) to the contrary, does not seem to have met with approbation.

§ 193. The question whether there is, or is not, a misrepresentation, not unfrequently turns upon the meaning of a particular word or phrase used in the policy; and in such cases the insured will have the benefit of all reasonable doubts, the construction being most strongly against the insurer as the author of the contract, and also because the court will not go any farther in enforcing a penalty or forfeiture than it feels obliged to by the necessary force of the language used. Thus where the property insured was a stock of goods described as "all of goods usually kept in a country store," and it was represented that no "cotton or woollen waste or rags" were kept in the building, and it appeared that clean white cotton rags were kept in the store; it was held, that, as such rags were ordinarily kept in a country store, and as there was an express provision in the by-laws that "cotton or woollen waste or oily rags" should not be allowed to remain over night in any building insured by the company, if cotton rags of any kind were excluded it could only be those which, from their nature or condition, are easily inflammable, and for that reason classed with "cotton and woollen waste."¹

§ 194. **Affirmative and Promissory Representations — Consequences of Breach different.** — There is an obvious distinction, in the consequences, between a misrepresentation of facts existing at the commencement of a risk and a neglect of duty in regard to a matter occurring afterwards; in other words, between an affirmative and a promissory misrepresentation. In the one case the policy never takes effect; the risk is never assumed; while in the other the risk attaches but is interrupted. It is doubtless upon this distinction that courts have held that the operation of a policy may be suspended, and again, after an interval of suspension, become operative and reattach to the subject at risk.² No right is acquired in the first case, while in the second a right is acquired which may be forfeited. And the same is true of a concealment of a fact at the time when the contract is entered into, and of a failure

¹ *Elliott v. Hamilton Mut. Ins. Co.*, 13 Gray (Mass.), 139.

² *Ante*, § 101.

to make known some fact which by the terms of the policy is incumbent upon the insured.¹

§ 195. **Test of Materiality, when Question for Jury.** — Where there is a warranty, no question of materiality of the fact warranted to exist or stipulated for, to be done or omitted, arises. But this question always arises where the fact in question is alleged to be a misrepresentation or concealment, except where they are converted into warranties, by a stipulation that an untrue answer shall avoid the policy. And that is material which, if known to the insurer at the time when the contract was under negotiation, would naturally and probably have induced him either to decline the risk or to have taken it only upon terms more advantageous to himself. And where this materiality depends upon circumstances, and is an inference to be drawn from such circumstances, and not upon the construction of some writing, it is a question of fact for the jury.²

§ 196. **Material, though Fact misrepresented does not directly relate to the Risk.** — And whether the misrepresentation or concealment relates to the risk itself directly, or to some incidental matter from which some inference may be drawn as to the propriety of accepting or declining the risk, the result is the same. If a party makes answers or representations touching such incidental matters, — as, for instance, relative to his pecuniary means or social or business relations, — of such a character that if they had not been made the insurers would have declined the risk, — a question to be submitted to the jury, — then the policy will be void. This point is well illustrated by the remarkable case of *Valton v. National Loan Fund Life*

¹ *Kimball v. Aetna Ins. Co.*, 9 Allen (Mass.), 540; *Obermeyer v. Globe Ins. Co.*, 43 Mo. 573.

² *Columbian Ins. Co. v. Lawrence*, 10 Pet. (U. S.) 507; *Campbell v. New Eng. Mut. Life Ins. Co.*, 98 Mass. 381; *Huguenin v. Railey*, 6 Taunt. 186; *Morrison v. Muspratt*, 4 Bing. 60; *Hartman v. Keystone Ins. Co.*, 21 Penn. St. 466; *Sibbald v. Hill*, 2 Dowl. P. C. 263; *Catlin v. Springfield Fire Ins. Co.*, 1 Sum. (U. S. C. Ct.) 434; *Mut. Benefit Life Ins. Co., Sup. Ct. Ind. Ins. L. J. March*, 1873; *Washington Life Ins. Co. v. Haney*, Sup. Ct. Kansas, 2 Ins. L. J. 283.

Assurance Society.¹ In this case, Schumacher, who was a partner with Martin and Valton, insured his life, and assigned the policy to them in case he should die, pending the copartnership, unmarried, Martin taking an active part in effecting the insurance. And upon the point under consideration the Appellate Court observed as follows:—

“The judge, among other things, charged the jury that if the insured untruly represented that he was a partner of the firm of Valton, Martin, & Company, or that if he untruly represented that he was the moneyed man of the firm, and either or both of such untrue representations were material to the risk, then the policy was avoided, and there could be no recovery. That if Schumacher was dead in September, 1850, and his occupation that of a merchant at the time the proposals were signed, and the representations of his being a partner, or the moneyed man of the firm, were either not untrue or not material to the risk, then the action was *primâ facie* sustained.

“The defendants’ counsel requested the court to charge the jury that if Schumacher himself, or by Martin in his behalf, represented to the agent of the defendants that Schumacher was a partner of the firm of Martin, Valton, & Company, when in fact at that time he was not such partner, and if the defendants would not have issued the policy if the representation had not been made, then the policy was void, and the plaintiffs could not recover. The judge declined so to charge, and the defendants’ counsel excepted. The defendants’ counsel also requested the judge to charge the jury that if they found that Schumacher himself, or by Martin in his behalf, represented to the agent of the defendants that Schumacher was the moneyed man of the concern of Valton, Martin, & Company, when in fact at that time he was not such, and that the defendants would not have issued the policy if the representations had not been made, then the policy is void, and the plaintiffs cannot recover. The judge refused so to charge, and the defendants’ counsel excepted. The charge of the judge was correct as far

¹ 20 N. Y. 32.

as given. If the representations were made, and false, the falsity must have been known to Schumacher and Martin. The facts were within their knowledge, and the representations fraudulent. The requests to charge, considered in connection with the charge given, present the question whether fraudulent representations made by the assured to the insurer upon his application for a policy, though not material to the risk, yet material in the judgment of the insurer, and which induced him to take the risk, will avoid the policy. This question has not been determined by any adjudged case in this State, so far as I have been able to discover. The elementary writers hold that the policy may be avoided.¹ In *Sibbald v. Hill*,² it was held that where the assured fraudulently represented to the underwriter that a prior insurance by another underwriter upon the same risk had been made at a less premium than it was in fact made, the policy was vitiated. In this case it is obvious that the risk itself was not affected by the representations. Lord Eldon, in his opinion, says that it appeared to him settled law, that if a person meaning to effect an insurance exhibited a policy underwritten by a person of skill and judgment, knowing that this would weigh with the other party and disarm the ordinary prudence exercised in the common transactions of life, and it turned out that this person had not in fact underwritten the policy, or had done so under such terms that he came under no obligation to pay, it appeared to him to be settled law that this would vitiate the policy. The courts in this country would say that this was a fraud ; not on the ground that the misrepresentation affected the nature of the risk, but because it induced a confidence without which the party would not have acted. The principle of this case, when applied to the one under consideration, shows that the judge committed an error in refusing to charge as requested. It is clear that the circumstance of a party being engaged in commercial business, possessed of large

¹ 1 Arnould on Ins. § 189 (original paging, 487-576) ; 2 Duer, 681-683 ; 3 Kent, 282.

² 2 Dow's Parl. R. 263.

means, might induce an insurer to make an insurance upon his life for a large amount, while were he a mere porter the risk would be rejected, although the chance of life would be as good in the latter situation as the former."

§ 197. It appears, therefore, to be the rule that a misrepresentation, though not bearing upon the character of the risk, if such as to mislead the insurers into taking a risk which otherwise would not have been taken, is as fatal to the validity of the policy as if it had related to the nature of the risk. Thus, by way of additional illustration, where one insurance company applied to another for reinsurance on certain articles of personal property, induced the reinsurers to believe that they had insurance on the buildings, which was not the fact, the policy was held to be void.¹ This is not strictly a misrepresentation of facts upon which the value of the risk is determined, but rather a false pretence of a fact which induces the insurer to take the risk without inquiry as to its value.

§ 198. **Representation — Substantial Compliance — Equivalents.** — A representation is substantially complied with by the adoption of precautions, which, if not those exactly stated in the application, may be such as tend to accomplish the same purpose and are regarded as equally efficacious. Thus, if benzine be prohibited in the policy, and permitted in an indorsement thereon, to the amount of one barrel to be kept in tin cans, keeping the whole in one tin can is a substantial compliance, if that is shown to be equally safe.² So if ashes are stated to be kept in brick, if they are kept in some other mode, equally safe, the policy will not be avoided.³ Where the stipulation is a representation and not a warranty, there is room for the substitution for equivalents amounting to a substantial performance; while if it be a warranty it is at least doubtful whether the doctrine can or ought to have any place, as one of the objects of a warranty is to obviate the necessity of dispute about the materiality or immateriality of a particu-

¹ Louisiana Mut. Ins. Co. v. New Orleans Ins. Co., 13 La. An. 246.

² Maryland Fire Ins. Co. v. Whitford, 31 Md. 219.

³ Underhill v. Agawam Mut. Ins. Co., 6 Cush. (Mass.) 440.

lar act. By a substantial compliance is meant the adoption of precautions, intended for the same purpose, adapted to it, and which may be reasonably regarded as equally or more efficacious. For instance, when it is said that ashes are taken up in iron hods, it would be a substantial compliance if brass or copper were used instead. So if it be represented that casks of water, with buckets, are kept in each story of the building insured, if a reservoir be placed above, with pipes to convey water to each story, and regarded by skilful and experienced persons to be equally efficacious, it would be a substantial compliance.¹

§ 199. While courts will sometimes sustain a merely literal and colorable compliance with a warranty as sufficient,² yet where representations are made as a full, just, and true exposition of all facts and circumstances material to the risk, in construing them, both as to existing facts and as to future precautions to be taken, both good faith and the terms of the contract require that there shall be a substantial, as well as literal conformity. Such representations must be construed with reference to the known and obvious requirements and purposes of the insurers, and so as to meet these requirements, and conform to them, if such a construction can be made without violence to the language used. If, for example, inquiries are made relative to the appliances for extinguishing fire in a factory, and it is answered that water casks are kept in each room, while the answer would be literally true if no water were kept in the casks, or if the casks, though kept filled with water, were few in number or so insignificant in size as to afford practically no security in the sense understood and required by the insurers, this would not be a full, just, and true statement of the facts, nor a substantial compliance with the undertaking of the insurer. That undertaking requires a substantial compliance, by keeping a cask or casks of water, of a size adequate to the required security, and holding a sufficient quantity of water to aid essentially in extinguishing a fire in its

¹ *Houghton v. Manufacturers' Mut. Fire Ins. Co.*, 8 Met. (Mass.) 114.

² *Ante*, § 178.

early stages in that part of the building.¹ And the same good faith requires that these casks should be kept supplied with water, though the fact that from freezing or other unavoidable cause they might be rendered temporarily unserviceable, would not avoid the policy, if reasonable diligence be used in restoring them to a serviceable condition.²

¹ *Houghton v. Manufacturers' Mut. Fire Ins. Co.*, 8 Met. (Mass.) 114.

² *Aurora Fire Ins. Co. v. Eddy*, 49 Ill. 106.

CHAPTER VIII.

OF CONCEALMENT.

§ 200. **Concealment defined.** — Representations should not only be true, but they should be full. The insurer has a right to know the whole truth. And a lack of fulness, if designed, in a respect material to the risk is tantamount to a false representation, and is attended by like consequences. This lack of fulness is termed a *concealment*, which is the designed and intentional withholding of some fact material to the risk which the insured in honesty and good faith ought to communicate to the insurer. It is not mere unintentional silence or inadvertence. It is a positive intentional omission to state what the applicant knows, or must be presumed to know, ought to be stated. It is a suppression of the truth whereby the insurer is induced to enter into a contract which he would not have entered into had the truth been known to him. It is a deception whereby the insurer is led to infer that to be true, as to a material matter, which is not true. Hence, strictly speaking, under the general law of insurance, there can be no concealment of a fact which is not known to the applicant.¹

§ 201. Of course, where the truth and fulness of a statement are warranted, it is no longer a question of concealment, but of the truth and fulness of the statement; and any failure to disclose a material fact, even though accidental, and by inadvertence or through ignorance, is followed by the same consequences as if intentionally concealed. And it has accordingly been held that all known facts material to the risk, if called for, must be disclosed, whether the party seeking insur-

¹ *Swete v. Fairlie*, 6 C. & P. 1; *Hall v. Peoples' Mut. Ins. Co.*, 6 Gray (Mass.), 185; *Merchants' and Manufacturers' Ins. Co. v. Wash. Mut. Ins. Co.*, 1 Hand (Ohio), 408; *Mut. Benefit Life Ins. Co. v. Robertson*, Sup. Ct. Ill. (not yet reported); *Gerhauser v. North B. and M. Ins. Co.*, 7 Nev. 174. And see *post*, § 211.

ance think them material or not, upon the ground that the question as to the belief of the party with regard to the materiality of the fact would in many instances be difficult to decide, and it would encourage suppression if that were the issue upon which the question of concealment should turn. On the other hand, if the materiality of the fact be made the issue, then it becomes the interest of the assured to state all the facts he knows.¹ And what a man of ordinary intelligence ought to know, the insured will be presumed to know, so that if he be asked whether he has any disease, though he may not know that he has, yet if he is afflicted with the symptoms of disease, he is bound to make known the fact that these symptoms exist.² And since the knowledge of an agent may be imputed to the principal, and is constructively his, he may be guilty of concealing a fact of which he has no actual knowledge. Thus, where an agent wrote to his principal to cause his vessel to be insured, after an accident which led to the loss of the vessel had happened, but did not mention to his principal, the owner, the fact of the accident, it was held that as the agent ought to have communicated the fact of the accident the concealment was constructively that of the owner, and he could not recover on a policy which he had effected in good faith.³

§ 202. On the other hand, it has been held that there is no concealment if the fact omitted be not known and believed to be material by the applicant. Thus, where the applicant had been insane several years before he applied for and took his policy, and had been placed in an insane asylum, whence he was discharged cured, his failure to state the fact at the time he procured his policy, no specific question being asked, but the policy by its terms being void for misrepresentation, fraud, or concealment, was held not to prevent a recovery; and this, although the insured had been, for a considerable period a canvassing agent of the insurers, and in a conversation with the president of the company, some time before the policy was taken

¹ *Lindeneau v. Desborough*, 3 Man. & Ry. 45.

² *Vose v. Eagle Life and Health Ins. Co.*, 6 Cush. (Mass.) 42; *Miles v. Conn. Mut. Life Ins. Co.*, 3 Gray (Mass.), 580.

³ *Gladstone v. King*, 1 Maule & Sel. 35.

out, had been told by him that they did not wish to insure insane persons, and had been instructed to be cautious on that point. The conversation which took place some time previous to the making of the contract, and had for its object to give instructions to the agent, was held to have no tendency to show a fraudulent concealment of material facts, unless it could also be shown that the facts omitted were, in the judgment of the insured, material.¹ So where, if the answers were in any respect untrue, the policy was to be void; and the question was whether the applicant had had any sickness within the last ten years, and the answer was that he had had pneumonia, but said nothing of a "slight attack of chronic pharyngitis," it was held to be no concealment, as the party was not bound to state such facts as would ordinarily be deemed immaterial, such as that he had had a cold, or a diarrhoea, or an irritation of the throat, not fairly embraced in what is popularly understood as sickness.² In *Hutchinson v. National Loan Assurance Society*,³ a warranty that the insured had no disease or symptom of disease was held to import only that, according to the knowledge and reasonable belief of the insured, there was freedom from any disease or symptom of diseases material to the risk. So in *Jones v. Provincial Insurance Company*,⁴ it was stated by the applicant that he was not "aware of any disorder or circumstance tending to shorten life," when in fact he had had within a year or two, two severe bilious attacks, about the tendency of which to shorten life the physicians who attended him differed in opinion. And it was said that if the assured honestly believed that these attacks had no tendency to shorten his life, his failure to mention them would not avoid the policy. What other persons of intelligence do not know or believe or apprehend cannot reasonably be expected of the insured. And what he cannot be expected to know, he cannot be considered as culpable for not knowing; and what

¹ *Mallory v. Travellers' Ins. Co.*, N. Y. Ct. of Ap. Feb. 1872, Ins. L. J. July, 1872.

² *Wise v. Mut. Benefit Life Ins. Co.*, Circuit Ct. (Md.) 1870; 2 *Bigelow, Life and Acc. Ins. Rep.* 43; s. c. affirmed, 34 Md. 582.

³ 7 Ct. of Sess. Cas. (Scotch) 467.

⁴ 3 C. B. N. s. 65.

he cannot be expected to apprehend, he cannot be bound to communicate; and in not communicating any such fact, he cannot be considered as concealing it even inadvertently, much less wilfully.¹ The knowledge which is imputable to the assured who undertakes to state all material facts, either absolutely or so far as they are known to him, may be actual or constructive. The law, however, does not undertake to decide whether this knowledge exists or not; it is rather a question of fact for the jury. The law will not say that a man must be presumed to know certain particular facts touching his estate; but the question whether certain facts, if misrepresented or concealed, were known to the applicant for insurance, is a question of fact to be found by the jury upon the evidence. And upon this point divers considerations, as authorizing the inference of knowledge, are fit and proper to be submitted to the jury; such as, that the applicant and insured is the owner of the property, and may be presumed to be acquainted with its condition; or, being the life-insured, is cognizant of his own condition; that the matter relates to things open and visible, things capable of distinct knowledge, and not depending upon estimate, opinion, or mere probability; things in respect to which an owner is bound in honesty and good faith to know, takes upon himself to know, and usually does know, — these, and all other pertinent evidence bearing upon the question, are to be left to the jury, with directions that if they are satisfied from all the evidence, and can reasonably infer that the assured did know the fact in regard to which misrepresentation or concealment is imputed, they are to find that he did know it; otherwise not.²

§ 203. The cases cited in the last section are apparently not in accord with *Lindeneau v. Desborough* and *Vose v. Eagle Life and Health Insurance Company*, cited in the preceding section. And certainly the language of these cases, more particularly the latter, as where it is said that, though there be no warranty, the concealment of a material fact will avoid the

¹ *Dennison v. Thomaston Mut. Ins. Co.*, 20 Me. 125, per Whitman, C. J. See *post*, § 211.

² *Houghton v. Manufacturers' Mut. Fire Ins. Co.*, 8 Met. (Mass.) 114.

policy, though the concealment be the result of accident or negligence and not of design, would seem to lay down an entirely different and much more stringent rule. On examination of the cases, however, it will be seen that the facts required no such decision. In both cases the facts undisclosed were such as in the opinion of the court the applicant knew or ought to have known. The question propounded seemed to Lord Tenterden, C. J., in the former case to be one "calling for an answer stating all the facts which any reasonable man might think material;" and in the case from Massachusetts the court say that the insured being inquired of if he had had consumption, "could have stated the symptoms of consumption which he had and which he knew he had." In both cases, therefore, facts were concealed which were known, actually or presumptively, to be material, and they were both no doubt well decided upon the facts. Neither case actually decides upon its facts any thing more than that the insured was bound to communicate all facts known to him, and by him believed to be material, presuming that he knew and believed what men of ordinary intelligence know and believe. In this view the cases are reconcilable. And perhaps this will be found to be the true rule, — that there is concealment whenever facts are withheld which are known, or which must be presumed to be known, because they ought to be known to an ordinarily intelligent person, to be material. According to this view, concealment is a violation of good faith, and not a mere error of opinion. Suppose the applicant is inquired of, as in the Massachusetts case, if he has consumption. He is, in fact, afflicted with a cough. But a cough proceeds from various other causes as well as from a disease of the lungs. He has in good faith endeavored to inform himself as to the true causes, and has been informed by his physicians that it does not proceed from the lungs, but from an entirely different cause. It would seem that the insured, who honestly believes, and has reason to believe, that his cough is due to some other cause, ought not to lose the benefit of his insurance, because, when asked if he has disease of the lungs, he does not disclose the fact that he has a cough, even though it should ultimately

appear that in point of fact the cough did proceed from a disease of the lungs, and that the applicant in fact had the consumption when the insurance was effected. Before the insured can fairly be said to conceal the fact of a particular disease, when he does not disclose the fact that he has symptoms, which may or may not indicate the presence of the disease, it would seem that it should at least appear that he knew, or had reason to believe, they were symptoms of the disease inquired about.¹

§ 204. And this seems to be the doctrine of the very recent case of *Horn v. Amicable Mutual Life Insurance Company*.² In that case the applicant was required to name the physician usually employed by him, and if he had none, then to name any other doctor who could be applied to for information upon the state of his health. He answered, "None;" and the fact was that he had occasionally applied to one physician to prescribe for a cough of long standing, accompanied by shortness of breath, and had also secretly applied to another insurance company, when his application was declined upon the examination of the physician of that company. It was held that as the applicant must have known that both of the doctors could have given important information as to his health, and denied, in effect, that there was any one who could give that information, there was, therefore, a fraudulent concealment, as matter of law. And in the same case the court proceeds to say that in life insurance the statements as to the health of the applicant are misrepresentations, and not warranties, and the question is one of honesty and fair dealing; and, referring to the case of *Miles v. Connecticut Mutual Life Insurance Company*,³ observes that that case is founded upon no analogous case of life insurance, unless it be *Vose v. Eagle Life*

¹ It is worthy of note that in *Mallory v. Travellers' Ins. Co.*, cited in last section, the court refer to *Lindeneau v. Desborough*, *ubi supra*, as one of the authorities upon which they base their decision. They also distinguish the case from those where specific questions are put, with a stipulation that the answers shall be full and true. They also cite *Rawls v. Amer. Life Ins. Co.*, 27 N. Y. 282; *Valton v. National Loan Fund Life Ass. Soc.*, 20 N. Y. 32. See also *Hogle v. Guardian Life Ins. Co.*, 6 Robt. (N. Y. Superior Ct.) 567; *Kelsey v. Universal Life Ins. Co.*, 35 Conn. 225.

² N. Y. Sup. Ct. 2d Dist. Dec. T. 1872, Alb. L. J. Feb. 15, 1873.

³ 3 Gray, 580.

and Health Insurance Company,¹ which itself was decided upon the ground of misrepresentation as well as upon that of warranty, upon which last ground no authority is cited in its support. No such rule, however, they proceed to say, has been laid down in New York, and they are unwilling to originate such a doctrine as law. The assured must state all he knows bearing upon the condition of his health, and any untrue statement or concealment in this respect ought justly to render the policy void. In all respects where it appears, or can be shown, that the applicant had any knowledge of the facts called for by the interrogatories, it matters very little whether the answer be held a warranty or not, inasmuch as any untrue statement will be a misrepresentation or fraud, which will equally avoid the policy.

§ 205. Indeed, the case of *Campbell v. New England Mutual Life Insurance Company*² seems to have been regarded as evincing a disposition on the part of the courts of Massachusetts to modify the severity of the rule which the language of the court in the case of *Vose v. Eagle Life and Health Insurance Company* would seem to require, and which was followed in the subsequent case, in the same State, of *Miles v. Connecticut Mutual Life Insurance Company*. Thus, in *Price v. Phoenix Life Insurance Company*,³ which was a case very similar in its facts, the court adopt the views of the Massachusetts case,⁴ although they say they are well aware that it would be difficult, if not impossible, to reconcile the views expressed in that case with the doctrines laid down in a great number of other cases.

§ 206. Always, however, to be remembered is that class of cases where the insured has bound himself, hand and foot, by a stipulation that his application contains a just, full, and true exposition of all the facts inquired for, or its equivalent in a different form of words, and is to be deemed a warranty. Such cases are to be distinguished from those we have been considering. In these, according to the received interpretation, no question of knowledge, good faith, or materiality arises ; it is

¹ 6 Cush. 42.

³ Sup. Ct. Minn. 2 Ins. L. J. 253.

² 98 Mass. 381; *ante*, § 187.

⁴ 98 Mass. 381.

simply a question of the truth and fulness of the answers; and a want of either is fatal. Such policies are practically no security at all. The insured is at the mercy of the insurer; and if the applicant will be so imprudent as to make such a bargain, the courts cannot help him.¹

§ 207. *Facts known to Insurer—Minor Details.*—A failure to state facts known to the insurer, or which he ought to know, since these he will be presumed to know, or which lessen the risk, for that only is material which tends to increase the risk, in the absence of express stipulation, and where no inquiry is made, is no concealment. The insurers are presumed to be skilled in their business, and to know those general facts, political and otherwise, which are open to the public, and may be known to all who are interested to inquire.² In like manner the insured is presumed to know what a man of ordinary capacity ought to know, and a failure to state such facts as are clearly material in the general judgment will amount to a concealment.³ Such details, however, as the characters and pursuits of the tenants or occupants of building;⁴ or the character of the buildings adjoining;⁵ or that the insured had commenced the erection of a new building near those insured;⁶ or of pending litigation relative thereto;⁷ or how a building is heated or lighted, unless in

¹ *Hardy v. Union Mut. Fire Ins. Co.*, 4 Allen (Mass.), 217; *Chaffee v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 376; *Kennedy v. St. Lawrence County Mut. Ins. Co.*, 10 Barb. (N. Y.) 285; *Abbott v. Shawmut Mut. Fire Ins. Co.*, 3 Allen (Mass.), 214; *Shawmut Mut. Fire Ins. Co. v. Stevens*, 9 ib. 332; *Columbia Ins. Co. v. Cooper*, 50 Penn. St. 331. We remember to have heard a learned judge, who was giving a reluctant judgment in one of these cases against the insured, observe, with considerable feeling, that if such companies would provide simply that they should never, in any event, be liable in case of loss, they would not only save the courts from much disagreeable duty, but would be free from the suspicion of having purposely entrapped the insured.

² *Carter v. Boehme*, 1 W. Black. 593; *Boggs v. Amer. Ins. Co.*, 30 Mo. 63; *Merch. and Mar. Mut. Ins. Co. v. Washington Mut. Ins. Co.*, 1 Hand (Ohio), 408; *Haley v. Dorchester Mut. Fire Ins. Co.*, 12 Gray (Mass.), 545; *Pimm v. Lewis*, 2 F. & F. 778; *Foley v. Tabor*, ib. 663.

³ *Dennison v. Thomaston Mut. Ins. Co.*, 20 Me. 125.

⁴ *Lyon v. Commercial Ins. Co.*, 2 Rob. (La.) 266.

⁵ *Satterthwaite v. Mut. Ben. Ins. Co.*, 14 Penn. St. 393.

⁶ *Gates v. Madison County Mut. Ins. Co.*, 1 Seld. (N. Y.) 469.

⁷ *Hill v. Lafayette Ins. Co.*, 2 Mich. 476.

the mode of heating or lighting there is something unusual,¹ — need not be disclosed unless inquired for. Although it was said in an early case that marine, fire, and life insurance stand upon the same footing as to the application of the doctrine of concealment,² it is certain that the courts have shown an inclination to be less strict in cases of fire insurance, where the insurers are by no means so dependent upon the insured for their information, and may, and often in fact generally, do, by themselves or their agents, make personal examination. Besides, the propounding of a series of questions as to particular facts gives rise to the inference that others are not regarded as material, or that upon them the insurer has informed himself. Hence a failure to disclose many minor details obvious to any one who examines, and open to general observation, is not to be regarded as a concealment.³

§ 208. **What Facts must be disclosed — Threats of Burning.** — Such facts, however, as are unusual, threatening, and not open to general observation, especially if they are the inducement or occasion for the application for insurance, ought to be disclosed, whether inquired about or not. The fact that frequent threats or attempts have been made to set fire to the property for insurance upon which application is made, is such an one as would naturally attract the attention of the insurers, if known, and modify their estimate of the risk. Withholding would therefore amount to a concealment, which would vitiate the policy.⁴ And the same would be true if the inducement which leads to the procurement of insurance is the fact that attempts have been made to set fire to neighboring property so

¹ *Girard Fire and Mar. Ins. Co. v. Stephenson*, 37 Penn. St. 293; *Clark v. Manufacturing Ins. Co.*, 8 How. (U. S.) 235.

² *Lindeneau v. Desborough*, 8 B. & C. 586.

³ *Burritt v. Saratoga County Mut. Fire Ins. Co.*, 5 Hill (N. Y.), 188; *Holmes v. Charlestown Mut. Fire Ins. Co.*, 10 Met. (Mass.) 211; *Jolly's Adm'r v. Balt. Eq. Soc.*, 2 H. & G. (Md.) 295; *Gates v. Madison County Mut. Ins. Co.*, 1 Seld. (N. Y.) 469.

⁴ *Curry v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535; *Beebee v. Hartford Mut. Ins. Co.*, 25 Conn. 51; *N. Y. Bowery Ins. Co. v. N. Y. Ins. Co.*, 17 Wend. (N. Y.) 359; *North American Fire Ins. Co. v. Throop*, 22 Mich. 146.

situated that if it should burn, the property upon which insurance is sought would be endangered.¹ But a neglect to disclose such facts, after insurance has been obtained, is not such a failure to make known any change of circumstances increasing the risk under a by-law providing that notice of such change of circumstances must be made under penalty of avoiding the policy if it be not done.²

§ 209. **General Statement Sufficient, if such as Good Faith and Fair Dealing require.** — A general statement of the facts, however, sufficient to put the insurers upon inquiry if they desire more particular information, is all that is necessary.³ But if inquiry be made on this point, as the matter is within the especial knowledge of the applicant, the answer should be full, and in itself contain the information which would naturally lead to further investigation. If, therefore, in response to a specific inquiry, the applicant declares that he has no reason to believe his property in danger from incendiarism, and it appears that in fact he had, it will be no reply that he had previously talked with the agent of the company about several recent attempts made to burn buildings in town, and the risk of such fires generally, without mentioning a supposed attempt upon the building upon which the application for insurance was made. Whether such talk might, or might not, have put him on inquiry is immaterial. The truth of the answer is the only question open to the jury. "When a person is particularly interrogated," said the court in *North American Fire Insurance Company v. Throop*,⁴ "regarding a subject peculiarly within his own knowledge, and the other party is expected to contract with him in reliance upon his answer, and the answer is made misleading, if not untruthful, it seems to us alike a perversion of law and justice to say that he shall have the advantage of his uncandid answers if he can convince the jury that the other party was wanting in prudence in relying upon

¹ *Walden v. Louisiana Ins. Co.*, 12 La. 134. See also *Buffe v. Turner*, 6 Taunt. 338.

² *Clark v. Hamilton Mut. Ins. Co.*, 9 Gray (Mass.), 148.

³ *Beebee v. Hartford Mut. Ins. Co.*, 25 Conn. 51.

⁴ 22 Mich. 146.

them, because of having extrinsic notice which was sufficient, if followed up by inquiries in other quarters, to have led him to a knowledge of the exact facts. The insurer has a right to know the truth from the assured himself; and if his inquiries addressed to him failed to elicit the truth, it is no excuse to the latter, either in morals or law, that the insurer, if sufficiently distrustful and suspicious, and inclined to rely upon what he had heard from others rather than upon the word of the assured himself, could be regarded as 'put on inquiry,' respecting the truthfulness and candor of the information, in consequence of something he had heard incidentally at a time when perhaps he had no special occasion to charge his memory with it. He goes to the authority that ought to be the best, and he has a right to rely upon what is told him. If it were allowable to submit to a jury the question of his prudence in doing so, it would be impossible for them, in most cases, to be so fully possessed of the exact condition of his information at the time as to be enabled to determine whether he was or was not guilty of negligence in such reliance." It was recently held, however, in *McBride v. Republic Fire Insurance Company*,¹ where there were specific threats against the particular property insured, and an answer to an inquiry upon this point was in the negative, that such an answer would not avoid the policy, unless the threats made were of such a character and from such a person that danger was reasonably to be apprehended, and such that a person of ordinary prudence and caution would regard them as worthy of notice. But mere idle talk, which by such a person might, and probably would, be disregarded, need not be communicated.

§ 210. *Equivocal Interrogatories.*—Of course, if the inquiry be equivocal, or calls for an answer which involves an expression of opinion, as when the question is as to the "distance of buildings within ten rods;"² or what buildings endanger the

¹ Sup. Ct. Wis. 2 Ins. L. J. 270.

² *Gates v. Madison County Mut. Ins. Co.*, 2 Comst. (N. Y.) 43; s. c. 1 Seld. (N. Y.) 469, reversing same case in 3 Barb. (N. Y.) 73; *Masters v. Madison County Mut. Ins. Co.*, 11 Barb. (N. Y.) 624.

one insured ;¹ or if there is a livery-stable in the vicinity ;² whether the first question involves the necessity of specifying all the buildings within that distance, or only the nearest ones, or what buildings "endanger," or what constitutes "vicinity," are questions to some extent of opinion upon which intelligent men may differ, and therefore it is enough to answer them as men of ordinary intelligence should. So if the inquiry be as to whether the applicant has suffered from any derangement of certain functions, or had any "serious illness," as the answer to these questions may be mere matter of opinion, an honest though erroneous answer is no misrepresentation.³

§ 211. Upon this point there is a comparatively early case in this country,⁴ so full of sound practical sense that it cannot be too often cited nor too often perused. The only facts necessary to be added to those stated in the opinion of the court are that to the questions, "What are the buildings occupied for that stand within four rods? how many buildings are there to the fires of which this may be in any case exposed?" there was no answer, and that the policy was to be void if any circumstance material to the risk was suppressed. Whitman, C. J., in giving the opinion, said:—

"The misrepresentation alleged is contained in the answer to a written interrogatory, propounded to the plaintiff, as to the distance of other buildings from the premises insured. The answer was in these words: 'East side of the block are small one-story wood-sheds, and would not endanger the buildings if they should burn.' In evidence it appeared that small sheds projected out from near the back part of the brick block of buildings (one of which was the house in question) twenty-four feet, being twelve feet in width, and eight feet stud; and leaving a passage-way in the rear of them of fourteen feet wide, adjoining some two-story wooden buildings standing on another street forty-nine feet from the plaintiff's

¹ *Dennison v. Thomaston Mut. Fire Ins. Co.*, 20 Me. 125.

² *Haley v. Dorchester Mut. Fire Ins. Co.*, 12 Gray (Mass.), 545.

³ *Hogle v. Guardian Life Ins. Co.*, 6 Robt. (N. Y. Superior Ct.) 567.

⁴ *Dennison v. Thomaston Mut. Ins. Co.*, 20 Me. 125.

house, and in which the fire which consumed the plaintiff's house originated.

"The first question which arises is, Was this a misrepresentation, or was there a suppression of the truth tantamount thereto, and material to the risk? It does not seem to be necessary, in order to avail the defendants in their defence, that the misrepresentation or suppression of the truth should have been wilful. If it were but an inadvertent omission, yet if it were material to the risk, and such as the plaintiff should have known to be so, it would render the policy void.

"In the case at bar it has now been rendered undeniable that the burning of the two-story buildings on another street endangered the plaintiff's house; and to the interrogatory propounded it now would seem that the existence of those buildings might, with propriety, have been stated. But this does not prove that before the occurrence of the fire it would have been deemed material to name them, as being near enough to put the plaintiff's house in jeopardy. It is not an unfrequent occurrence, after a disaster has happened, that we can clearly discern that the cause which may have produced it would be likely to have such an effect; while, if no such disaster had occurred, we might have been very far from expecting it. In this case it is essential to determine whether the plaintiff was bound to have known that a fire, originating in the two-story wooden buildings, would have endangered the burning of his house. If, as a man of ordinary capacity, he ought to have had such an apprehension, then he ought to have named those buildings in reply to the interrogatory propounded; for what a man ought to have known, he must be presumed to have known. His knowledge in a case like the present must have been something more than that, by a possibility, a fire so originating might have endangered his house. This kind of knowledge might exist in regard to a fire originating in almost any part of a city like Bangor; for a fire originating in an extreme part of it, if the wind were high and favorable for the purpose, might endanger all the buildings, however remote, standing nearly contiguous one to

another to the leeward of it. Any danger like this could not have been in contemplation when the interrogatory was propounded. Such buildings only as were so nearly contiguous as to have been, in case a fire should originate therein, productive of imminent hazard to the safety of the plaintiff's dwelling could have been in view by the defendants. And the question is, Were the two-story wooden buildings of that description ?

“In reference to this question, it may not be unimportant to consider that the defendants, at the time when this policy was effected, had an agent residing in Bangor, whose business it was to attend in their behalf to the applications for insurance in that quarter. It may be believed that the selection of this individual was the result of knowledge with regard to his intelligence and capacity for such purpose. It was not, however, his business perhaps to prepare representations to be made by applicants for insurance. But it did so happen that he assisted the plaintiff in preparing the answers to the standing interrogatories before named, intended to produce a representation upon which to found the estimates of the propriety of assuming the risks proposed. He, it seems, examined the premises, looked at the wood-sheds, and the two-story wooden buildings beyond them. To him it did not seem to have occurred that the vicinity of those buildings was such as to render it necessary that the two-story wooden buildings should be named in answer to the interrogatory ; for he, at the request of the plaintiff, penned the reply thereto as he thought proper.

“It does not appear that any witness has testified that, anterior to the disaster, he should have anticipated such an event as within the range of probability. What other individuals of intelligence did not foresee to be likely to occur, could not reasonably be expected of the plaintiff. And what he could not be expected to know, he cannot be considered as culpable for not knowing. And what he could not be expected to apprehend, he could not be bound to communicate ; and in not communicating any such fact, he could not be considered as guilty of concealing it, even inadvertently, and much less wilfully.

“As to the wooden sheds, they were named; and the description given of them is precisely in conformity to the truth. They were named, however, in connection with an opinion that, if they took fire, they would not endanger the house. There is, then, no misrepresentation with regard to their existence. The misrepresentation complained of, in reference to them, is merely in matter of opinion. But opinions, if honestly entertained and honestly communicated, are not misrepresentations, however erroneous they may prove to be. That this opinion was uttered *bonâ fide*, and in perfect singleness of heart and purpose, may well be believed, and may fairly be deducible from the fact that it was expressed in concurrence with the unquestionable belief, at the time, of its correctness, by the confidential friend of the defendants. An opinion so uttered, if not in good faith, might well be complained of, as it might tend to throw the defendants off their guard. In such case, it might tend to show a fraudulent design; and in connection with evidence of misrepresentation of facts, even short of what otherwise might be necessary to vacate a contract, would be likely to have that effect.”

§ 212. **Equivocal Answer.** — An equivocal answer, however, to a question, though true in one sense, may involve a misrepresentation or concealment, all the facts being known to the applicant; as if the insured should say he had been sick a week when he had been sick two weeks, or had had a medical attendant once within a certain period when in fact he had had one on several occasions within that time, or that he was thirty years old when in fact he was fifty.¹ And Lord Cockburn thought that when the insured was asked as to his occupation or profession, and answered that he was an “engineer,” which in fact he was, but was also an ironmonger, he should have stated the latter fact. But the rest of the court did not agree with him.² So if at the time of insurance objection is made to the proximity of a gambling establishment, the fact that the premises upon which insurance is applied for is

¹ Cazenove v. Brit. Eq. Ass. Co., 6 C. B. N. S. 437; s. c. on appeal, 29 L. J. (P.) 160.

² Perrins v. Mar. and Gen. Trav. Ins. Co., 2 E. & E. 317.

occupied in part by gamblers, is one which might be material.¹ An equivocal or evasive answer, where all the facts are known to the applicant, so that he can answer unequivocally, is just as fatal as a false one. If not untrue, it is practically a concealment. As when one has had, and knows he has had, certain symptoms of disease inquired about, and he answers, "See surgeon's report;"² or is inquired of as to the number of times he has required medical attendance, and answers, "Two years ago," when in fact he had required it at other times;³ or as to his age, and gives a less number of years than the true number;⁴ or as to occupation, and having two, he states the one most favorable to himself.⁵ But on this point of occupation the Court of Exchequer Chamber seem to have sanctioned the most obvious equivocation.⁶ So if the insured equivocates as to his medical attendant; or if, having had more than one, gives the name of that one whom he has reason to believe is least able to give the information sought by the insurers.⁷

§ 213. *Agent's Concealment imputable to Principal.*—Concealment or misrepresentation by an agent authorized to effect the insurance is of course concealment or misrepresentation by the principal, and carries with it the same consequences. The important question is whether the agent is of such a character. In effecting insurance upon the lives of third persons, reference is often made to the person whose life is to be insured, or to some other person for information, and the doctrine that such persons so referred to are to be considered as the agents of the insured in giving answers to all material

¹ *Lyons v. Com. Ins. Co.*, 2 Rob. (La.) 266.

² *Smith v. Aetna Life Ins. Co.*, Ct. of App. N. Y. Jan. 1873, 2 Ins. L. J. 116.

³ *Cazenove v. Brit. Eq. Ass. Co.*, 6 C. B. N. s. 437.

⁴ *Ibid.*, per Pollock, C. B. *Murphy v. Harris, Batty (Irish)*, 206; *Wray v. Man. Prov. Ass. Co.*, cited by Bliss, Ins. 165.

⁵ *Hartman v. Keystone Ins. Co.*, 21 Penn. St. 406.

⁶ *Cazenove v. Brit. Eq. Ass. Co.*, 6 C. B. N. s. 437; *ante*, § 212.

⁷ *Morrison v. Muspratt*, 4 Bing. 60; *Hutton v. Waterloo Life Ass. Soc.*, 1 F. & F. 735; *Monk v. Union Mut. Life Ins. Co.*, 6 Robt. (N. Y. Superior Ct.) 455; *Huckman v. Fernie*, 3 Mees. & Wels. 505. And see also *Forbes v. Ed. Life Ass. Co.*, 10 Ct. of Sess. Cas. (Scotch) 451; *Abbott v. Howard, Hayes (Irish)*, 381; *Maynard v. Rhodes*, 1 C. & P. 360.

questions which may be put to them respecting the matters as to which they may be properly interrogated, has apparently received the sanction of some learned judges.¹ But in a comparatively recent case,² Lord Campbell carefully reviewed the several cases supposed to give such sanction, showing that they did not necessarily so decide, and came to the conclusion that the doctrine is unsound. And it seems now to be the settled law of England that when the insured does not expressly stipulate for the truth of the statements of third persons thus referred to, but only states his belief in their truth, fraudulent misrepresentation or concealment by them, but not known to the insured, will not avoid the policy. They are not agents in any such sense as to make him responsible for what they fraudulently state, or fail to state.³

§ 214. *Statements of the Person whose Life is insured as against the Party insured.* — But where one procures insurance upon the life of another, the latter having signed the application upon the truth of the answers in which the validity of the policy is made to depend, it has been held on the one hand that evidence of the declarations of the party upon whose life the insurance is effected as to the state of his health, whether made before or after the insurance is effected, if made about that time, or so near as to afford a probable inference as to the state of his health, is admissible against the insured.⁴ But such declarations must have been made within such reasonable proximity to the time of effecting the insurance as to afford some substantial ground of inference as to the state of health at that time. One important ground upon which such declarations are received is, that they are a part of the *res*

¹ See *Fitzherbert v. Mather*, 1 Term R. 12; *Cornfoot v. Fowke*, 6 Mees. & Wels. 358; *Morrison v. Muspratt*, 4 Bing. 60; *Maynard v. Rhodes*, 5 Dowl. & Ry. 266; *Lindenau v. Desborough*, 8 B. & C. 586; *Everett v. Desborough*, 5 Bing. 503; *Huckman v. Fernie*, 3 Mees. & Wels. 505; *Swete v. Fairlie*, 6 C. & P. 1; *Rawlins v. Desborough*, 2 Moo. & Ry. 329.

² *Wheulton v. Hardisty*, in the Queen's Bench, affirmed in the Exchequer Chamber, 8 El. & Bl. 232.

³ See also *Rawls v. American Mut. Life Ins. Co.*, 27 N. Y. (13 Smith) 282, affirming s. c. 36 Barb. (N. Y.) 357.

⁴ *Kelsey v. Universal Ins. Co.*, 35 Conn. 225; *Aveson v. Lord Kinnaird*, 6 East, 188.

gestæ. The subject of inquiry is the health of the person whose life is insured at the time the insurance is effected, and no one can have so perfect a knowledge of that as the person himself. Medical men always arrive at their conclusions in respect to the health by information derived in part from what their patients say ; and what is said by them under circumstances which preclude any suspicion or collusion is as fairly a part of the *res gestæ*, in respect to health, as symptoms learned from other sources.¹ In both of the cases just cited the statements were made prior to the consummation of the contract, and therefore, strictly speaking, what was said about the admissibility of statements subsequent thereto is extra-judicial. And so they seem to have been regarded by the court in a very recent case in Kansas,² where it was held that the declarations of a party whose life was insured for another's benefit, made long after (it does not appear by the report of the case how long) the contract was completed, cannot be received in evidence against the insured to impeach the truthfulness of the statements of the same party made in the application. The contract, it was said, is between the insured and the insurer. The parties are the same whether that which is insured is a human life or a building. There is this difference, however, that the life being active, can, by its conduct, affect the contract, even so far as to annul it, while the building, being inanimate and passive, has of itself no such power. But aside from this the rights and liabilities of the parties to the contract are the same. The party upon whose life the insurance is effected is not a party to the record, and therefore his declarations are not admissible on that ground. He is not a party in interest, as the whole benefit enures to the insured. Neither is he the agent of the insured, authorized to speak in his behalf, nor does he come within any other rule by which his declarations can be received against the insured. And such was the doctrine in the case of *Rawls v. American Life Insurance Company*, with reference to statements made before the

¹ *Kelsey v. Universal Ins. Co.*, 35 Conn. 225 ; *Aveson v. Lord Kinnaird*, 6 East, 188.

² *Washington Life Ins. Co. v. Hovey*, Sup. Ct. Kansas, 2 Ins. L. J. 283.

contract was entered into, the length of time prior to that event not being adverted to¹ and the inadmissibility being placed upon the ground that the life insured was no party in interest to the contract, and could therefore make no statement or admission, in the absence of authority, that would divest the rights of the plaintiff, — the insured. So also, in *Fraternal Mutual Life Insurance Company v. Applegate*,² where a wife had insured the life of her husband for her benefit, the declarations of her husband, made after the insurance as to the state of his health before that time, were held inadmissible for the purpose of impeaching the truthfulness of the statements made in the application, which, in this respect differing from the cases which we have just been considering, was signed by the beneficiary thus: "Henrietta Applegate, by H. S. Applegate," the husband. The statements in question were regarded by the court as those of a stranger who was neither a party to the suit, nor, at the time when they were made, acting as the agent of the insured. They were not the declarations of a sick person in relation to his condition at the time of making them, but related to transactions and a state of facts long past. They were not admissions against interest, for they could only affect injuriously his wife's separate property. They were not the statements of one who had been a witness on the trial offered to impeach his testimony. And although they were the declarations of the person who best knew the facts, this would only go to their weight, when their competency had been established.³

§ 215. **Special Facts deemed Material to be disclosed.** — Whether the fact that the insured was in prison at the stated place of residence was material should be submitted to the jury.⁴ So, too, the fact that he had been insane twenty years

¹ 36 Barb. (N. Y.) 357; s. c. affirmed, 27 N. Y. 282.

² 7 Ohio St. 292.

³ And see also *Stobart v. Dryden*, 1 Mees. & Wels. 615, from which it is to be inferred that *Aveson v. Lord Kinnaird* is not an authority save upon its exact facts. In fact this case and the case of *Kelsey v. Universal Life Ins. Co.*, *ubi sup.*, seem to have carried the principles upon which they proceed — a *quasi* right of cross-examination, and the doctrine that the declarations are part of an act, and so part of the *res gestæ* — to an extreme, if not to an untenable limit.

⁴ *Hagenin v. Bailey*, 6 Taunt. 186.

before, if to the applicant's own mind it was material.¹ So a misstatement as to his pecuniary condition and relations may be material, if made to the medical examiner, whose decision upon the quality of the risk might be influenced by the fact that the applicant had the means to take proper care of himself,² but not a misstatement, which amounts only to an opinion as to whether there has been any derangement of certain functions, or whether he has had any "serious illness."³ And in a case reported by Ellis, it seems to have been assumed that a concealment of the fact that the insured, a single woman, had, a year or two before, had a child, was material. So the physician was permitted to testify. But there was another good ground of defence, and the case upon this point cannot be entitled to much weight.⁴ As the right of lien is vital to the existence of mutual insurance companies, an omission to state an incumbrance, especially if inquired about, and answers in the application are agreed to be true and full, is conclusively material as matter of law.⁵ But an agreement between the mortgagee and mortgagors that the latter shall pay the premium upon an insurance in the name of the latter is not a fact material to be disclosed.⁶ Nor need the not unusual mode of use or manner of heating or lighting the property insured be stated unless inquired for.⁷

¹ *Mallory v. Travellers' Ins. Co.*, N. Y. Ct. of App. 1872.

² *Valton v. Nat. Loan Fund Ass. Soc.*, 1 Keyes (N. Y.), 21, reversing s. c. 17 Abb. (N. Y.) Pr. Cas. 278.

³ *Hogle v. Guardian Life Ins. Co.*, 4 Abb. (N. Y. Superior Ct.) Pr. Cas. n. s. 346.

⁴ *Edwards v. Barrow, Ellis, Ins.* 116.

⁵ *Bowditch Mut. Fire Ins. Co. v. Winslow*, 3 Gray (Mass.), 415.

⁶ *Kernochan v. N. Y. Bowery Ins. Co.*, 17 N. Y. 428, reversing s. c. 5 Duer (N. Y. Superior Ct.), 1.

⁷ *Girard Fire and Mar. Ins. Co.*, 37 Penn. St. 293; *Clark v. Manuf. Ins. Co.*, 8 How. (U. S.) 235; *Boggs v. American Ins. Co.*, 30 Mo. 63.

CHAPTER IX.

OF SPECIAL PROVISIONS OF THE CONTRACT.

§ 216. IN proceeding to consider the scope and effect of the various conditions and stipulations in which the modern contract of insurance abounds, it is of the first importance to determine whether they are in the nature of warranties or representations, and if so, whether they are affirmative or promissory, and also whether they are themselves controlled by accessory stipulations as to their truth, fulness, and materiality. Since some policies, as we have seen, seek to make all the statements in the application warranties by making them by express stipulation a part of the contract, while others stipulate that they are to be referred to for a limited purpose only, as for the purpose of description and identification, or stipulate for the truth of all facts stated, or for their truth only so far as risk or value are concerned, or so far as is known to the insured, or they are material to the risk, or are inquired for, or for their truth in all these respects ; or refer to the statements in the application, which by reference is made part of the contract, as representations ; or as to be used and resorted to to explain the rights and obligations of the parties. Much depends upon the proper solution of these preliminary questions, as will be seen by a perusal of the preceding chapters, in which we have endeavored to state some of the general principles applicable thereto. Bearing these in mind, we shall be better able to arrive at satisfactory conclusions upon the many perplexing questions which will arise, and, guided by their light, we shall find that many decisions, apparently contradictory and irreconcilable, are not so in fact, but stand well upon the special circumstances of the case and the special stipulations of the contract under consideration.

§ 217. **General Purpose of the Stipulation.** — There are two general classes of these stipulations which it is well to notice : first, those relating to matters and things prior to the loss, and having for their general object to define and determine the limits of the risk ; and second, those which relate to matters and things occurring after the loss, and having for their object to define and determine the mode in which an accrued loss is to be established, adjusted, and recovered. The former pertain more especially to the circumstances which affect the risk, such as the character, habits, mode of life, use, occupation, alteration, alienation, title, location, and the like, of the person's property or premises insured, and constitute, so to speak, the substance of the contract ; while the latter pertain more especially to those formal acts and circumstances which, when reciprocal rights and liabilities have become fixed by the terms of the contract, are supplementary thereto, and necessary to make it productive to the insured of the benefit sought thereby. As to the former, relatively speaking, there is more strictness in holding parties to the terms of the contract, and less readiness to find in the circumstances a waiver of their respective rights. In other words, the courts will proceed with caution in determining the question of the liability of the insurer ; but when this liability is fixed by the capital fact of a loss within the range of their responsibility, they will be very reluctant to deprive the insured of the benefit of that liability, by any failure or neglect to comply with the mere formal requisitions of the contract, by which his right is to be made available for his indemnification.

§ 218. **Increase of Risk, generally.** — The not unusual provision that if the situation or circumstances affecting the risk upon the property insured shall be altered or changed, with the consent of the insured, so as to increase the risk, the policy shall be void, binds the assured not only not to make any alteration or change in the structure or use of the property which will increase the risk, but prohibits him from introducing any practice, custom, or mode of conducting his business which would materially increase the risk, and also from discontinuing any precaution represented in the applica-

tion to have been adopted and practised with a view to diminish the risk. Its legal effect is, so far as the representations set forth certain usages and practices observed in and about the business or property insured, as to the mode of conducting the business or management of the property, and as to precautions against fire, that they are not only an affirmation of the truth of the facts at the time they are stated, but a stipulation that, so far as the insured and all those intrusted by him with the care and management of the property are concerned, such mode of conducting the business shall be substantially observed, and such precautions substantially continue to be taken during the currency of the policy.¹ And as to both, the compliance should be substantial and in good faith, and not merely literal and colorable.² Whether the change be material is for the jury, and if the jury find that the change increases the risk it will be fatal.³ In *Stokes v. Cox*,⁴ the Court of Exchequer Chamber upheld a verdict reversing the judgment of the Court of Exchequer setting it aside,—where it was recited in the policy that no steam-engine was employed on the premises, and there was a condition that in case the risk should be increased by any alteration of circumstances the policy should be void. There was a boiler on the premises at the time of the insurance, used for generating steam for heating water and warming the rooms; but a steam-engine was afterwards erected. The fact that the policy stated that no steam-engine was employed, was held not to be a warranty that none should be, but under the condition it might be if it did not increase the risk.⁵ A contemplated change, however, and preparations to that end not amounting to the actual en-

¹ *Houghton v. Manuf. Mut. Fire Ins. Co.*, 8 Met. (Mass.) 114.

² *Ibid.* And see *ante*, § 198.

³ *Hobby v. Dana*, 17 Barb. (N. Y.) 111; *Jennings v. Chenango County Mut. Ins. Co.*, 2 Denio (N. Y.), 75.

⁴ 1 H. & N. (Exch.) 320.

⁵ In their opinion the court alluded to the criticisms of Lord Campbell in *Sillem v. Thornton* (cited *post*, Ch. XI.), on the cases of *Shaw v. Robberds* and *Pim v. Reid*, apparently with disapprobation, and pointed out the fact that *Sillem v. Thornton* did not at all present the case of a change in use increasing the risk, but rather that of a misrepresentation in describing the property insured.

tering upon the new business, has no effect. A warranty against engaging in a more hazardous occupation is not violated by setting out on a journey with an intent to engage in such occupation, the life being lost before any actual engagement therein, and while on the journey, the policy providing that the life — a slave — should not be removed to more southern latitudes. This implied that he might be removed to more northern latitudes. It was allowable to remove him, and the loss being occasioned by a high wind, and not by the intention to employ him in a more hazardous occupation, no provision, express or implied, of the policy was infringed.¹

In *Boatwright v. Aetna Insurance Company*,² an attempt was made to restrict the meaning of that clause of the policy which provides against any increase of risk by the occupation of the premises for hazardous purposes, so that it should apply only to such hazardous uses as were declared to be so in the classification of risks. But the court did not accept this view of the case; holding, on the contrary, that the occupation for any hazardous purpose, whether enumerated in the special class or not, would avoid the policy.

In *Schmidt v. Peoria Marine and Fire Insurance Company*,³ the court go so far as to hold that, under a general stipulation that an increase of risk shall avoid the policy, the right of the insurers to object is limited to those losses which occur while the increase of risk continues; and this still appears to be the law of Illinois. But the courts of no other State have gone to that extent. And the case which was referred to and relied upon as having decided the same point in the same way,⁴ was one where the policy expressly provided not that the policy should be void if the risk was increased, but that if the property should be used or appropriated to or for any of the prohibited purposes, the policy should cease and be of no effect so long as such use continued, — a provision which, so far as the reported case shows, does not appear to have been contained in the case under consideration.

¹ *Zummers v. U. S. Ins. An. and Tr. Co.*, 13 La. An. 504.

² 1 Strob. (S. C.) 281.

³ 41 Ill. 295.

⁴ *New Eng. Fire and Mar. Ins. Co. v. Wetmore*, 32 Ill. 221.

§ 219. Even so broad a restriction to the liability of the insurers, as that they shall not be held responsible if the risk be increased by any means whatever without the assent of the insurers, is to be so interpreted that a reasonable use of the property insured, having regard to its nature and circumstances, may be made by the insured. A farmer insures his horses against loss by fire and lightning for five years, and describes them as kept on his farm. This does not preclude him from calling upon the insurers for any indemnity if a loss happens off the farm, as when going to church, or to market, or to visit a friend in the neighborhood, or otherwise within the ordinary range of uses to which farmers customarily put their horses. It cannot be supposed that in such a case it is intended that the insured shall get a permit every time he goes off his farm. So precarious an insurance one would hardly take the pains to obtain.¹ Increase of risk means material increase, and "additional" risk is not necessarily material increase.² Nor is a permission given by the insured to shipwrecked seamen to take shelter in his storehouse for the night a change of risk in the sense of the policy, although, in violation of the orders of the insured, they kindle a fire in a stove whereby the building is set on fire and consumed.³ Nor does it include ordinary repairs.⁴ And such a clause is limited and controlled by another provision in the same policy, that an increase of risk from certain specified causes shall only have the effect to suspend the policy while the risk continues.⁵

§ 220. Still the general and sweeping clause making the insured responsible for all such changes within his control as increase the risk, is one which needs to be looked to very care-

¹ *Peterson v. The Mississippi Valley Ins. Co.*, 24 Iowa, 494. And see *post*, § 224.

² *Allen v. Mut. Fire Ins. Co.*, 2 Md. 111; *Mayor of N. Y. v. Hamilton Mut. Ins. Co.*, 10 Bosw. (N. Y. Superior Ct.) 537; *Baxendale v. Harvey*, 4 H. & N. (Exch.) 445.

³ *Loud v. Citizens' Mut. Ins. Co.*, 2 Gray (Mass.), 221.

⁴ *Townsend v. North Western Ins. Co.*, 18 N. Y. 168; *Lyman v. State Mut. Fire Ins. Co.*, 14 Allen (Mass.), 229.

⁵ *Mayor, &c. v. Hamilton Mut. Ins. Co.*, 10 Bosw. (N. Y. Superior Ct.) 537; *Bowman v. Pacific Ins. Co.*, 27 Mo. 152.

fully, as it applies to improvements, such as the erection of new buildings,¹ or the putting an oven into a house already built,² or the introduction of new machinery.³ And even a removal of a steam-engine from one place to another on the same premises, as from a position in the court-yard to a place within the building, may amount to an alteration which, if the removal is availed of by use, will avoid the policy.⁴ And under the usual proviso against increase of risk, if the risk be increased, it becomes entirely immaterial to inquire whether the loss was occasioned by the increase of risk, unless the stipulation be that the insurers will not be liable for any loss occasioned by an increase of risk.⁵ But if the insured have two policies from the same office, and they procure by the payment of an additional premium the right to increase the risk under one, this increase will not vitiate the other policy, although it be also an increase of risk to the property in that policy insured.⁶

§ 221. These stipulations against increase of risk usually avoid the contract by the mere fact of the change which causes such increase, unless the insurers be notified of such change, and assent thereto. But there is oftentimes added another clause, which leaves it optional with the company, after receiving knowledge of the change in the risk, whether to cancel the policy or not. This was the case in *Allen v. Massasoit Insurance Company*,⁷ where the court takes occasion to refer to these respective provisions, and to state their scope and purpose.

“There are two clauses in the policy which refer to such a state of facts. The first declares that ‘if the situation or circumstances affecting the risk thereupon’ shall be so altered or changed by or with the advice, agency, or consent of the

¹ *Murdock v. Chenango County Mut. Ins. Co.*, 2 Comst. (N. Y.) 210; *Francis v. Somerville Mut. Ins. Co.*, 1 Dutch. (N. J.) 78.

² *Boatwright v. Aetna Ins. Co.*, 1 Strob. (S. C.) 281.

³ *Reid v. Gore, Dist. Mut. Fire Ins. Co.*, 11 Upper Canada (Q. B.), 345.

⁴ *Bunell v. Jeremy*, 3 Wels. Hurl. & Gor. (Exch.) 535.

⁵ *Gardiner v. Piscataqua Mut. Fire Ins. Co.*, 38 Me. 439; *post*, § 223.

⁶ *North Berwick Co. v. N. E. Fire and Mar. Ins. Co.*, 52 Me. 336.

⁷ 99 Mass. 161.

assured as to increase the risk thereupon, 'the risk thereupon shall cease and determine, and the policy become null and void, unless confirmed,' &c. The second clause is as follows: 'If, during the insurance, the risk be increased by the erection of buildings, or by the use or occupation of neighboring premises or otherwise, or if the company shall so elect, it shall be optional with the company to terminate the insurance after notice given to the assured or his representative of their intentions to do so, in which case the company will refund a ratable portion of the premium.'

"The two clauses were directed to two objects: the first, to whatever should increase the risk by the consent or agency of the assured; and the second, to whatever should increase the risk without his consent by the agency of others.

"The first it was intended to guard against absolutely, it being within the power of the assured to prevent; the latter, which might occur without his act, or even without his knowledge, it was just should not affect his rights without notice. The mention of the erection of buildings was merely the specification of one mode in which the risk might be increased; and appears to have been given by way of illustration. But the previous provision was general, and included all modes in which the risk should be increased by the agency of the insured."

§ 222. **Increase of Risk — Alteration.** — An almost universal provision of the policy is one intended to guard against the danger of increase of risk by alteration. This alteration may take place in the building insured, or in its mode of use or occupation, or in its situation with reference to other buildings, or in any other circumstance tending to change the character of the risk. This does not, as a general rule, include every, the least, alteration. In marine insurance a deviation from the voyage is held to avoid the policy; but this has been said to be not on the ground of an increase of the risk, but on the ground that the insured has voluntarily substituted another voyage for the one insured, and the change of the voyage determines the contract from the time it happens. The same strictness, however, is not observable in fire insur-

ance. It would seem, at the first glance, that the enlargement of a building, already contiguous to a building on one side, so that it should be contiguous on two sides, must necessarily increase the risk, the points of contact having been increased. And so it has been contended, in analogy to the doctrine of marine insurance, that a deviation avoids the policy without reference to an increase of the risk. But it is to be considered that, while by deviation the identity of the voyage insured is changed, a building may be altered, repaired, or enlarged without substantially affecting its identity, either as a structure or as a subject-matter of insurance. It may still remain the same, or so nearly so that the increase of risk is inappreciable. Indeed, it may be that there is no increase at all, and possibly even a diminution. The substitution of a slated for a shingled roof, for instance, even though, in the change, the area of the roof should be somewhat enlarged, it is obvious, would not increase the risk, though it would undoubtedly be an alteration. So the extension of a wooden building towards and nearer to an adjacent building, might increase the risk, but a substitution for wood of brick, stone, slate, or some other substance less combustible than wood, at the point of nearest proximity, might more than counterbalance the increase of risk from the extension. Whether the alteration, therefore, in any particular case will avoid the policy, depends as a general rule upon its materiality, and this again is determined by the question whether it increases the risk, — a question of fact to be determined by the jury upon all the circumstances of each particular case.¹ Pardessus is of the opinion that the rule as to the effect of a deviation at sea would not be so strictly applied to a transit by land; but that in the latter case the deviation would not avoid the policy, if the insured, after deviation, should return to the route indicated in the policy.²

§ 223. **Alteration — Materiality — Warranty.** — Of the ele-

¹ *Curry v. The Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535; *Larabee v. Wilson*, Doug. 271; *Jolly v. Balt. Eq. Soc.*, 1 H. & G. (Md.) 295; *Stetson v. Massachusetts Mut. Fire Ins. Co.*, 4 Mass. 330.

² *Cours de Droit. Com.* § 596, par. 3.

ments to be considered in determining the question of the materiality of an alteration, one of prime importance is whether the alteration be such that had the insurance been sought on the building, as altered, a higher rate of insurance would have been demanded than was demanded on the building as actually insured. And if such be the fact, then it would be of no avail to show in an action for a loss that it was not occasioned by the alteration, nor, on the other hand, would it be incumbent on the insurers to show that it was occasioned by the alteration. In other words, the question of materiality does not necessarily depend upon the fact whether the loss is, or is not, occasioned by the alteration.¹ The question of the materiality of an alteration or change may, however, by express stipulation, be taken out of the field of debate. It is competent for the parties to agree that this or that alteration or change shall work a forfeiture, in which case the only inquiry will be whether the one in question comes within the category of changes which by agreement shall work a forfeiture. Thus, where in a policy of insurance there is a memorandum of hazardous trades, and it is stipulated that none of these trades shall, during the currency of the policy, be carried on in the building insured upon penalty of forfeiting the right to recover in case of loss, the use of the building for such a trade will avoid the policy; and evidence to show that the actual use did not increase the risk of damage by fire will be inadmissible, and this, although the policy covered one of the specially hazardous risks.² But even in case where the stipulation with reference to alteration is a warranty, want of literal and exact fulfilment as to minute matters, immaterial to the risk, will not avoid the policy. The jury will consider whether the warranty is substantially observed.³

§ 224. **What Extent of Alteration permissible when not inhibited.**— Unless there be a special stipulation to the contrary, when a building is insured, the insured does not relinquish

¹ *Merriam v. The Middlesex Mut. Fire Ins. Co.*, 19 Pick. (Mass.) 162.

² *Lee v. Howard Fire Ins. Co.*, 3 Gray (Mass.), 583; *Glen v. Lewis*, 8 Wels. Hurl. & Gor. (Exch.) 607.

³ *Girard Fire and Mar. Ins. Co. v. Stephenson*, 37 Penn. St. 233.

the right of exercising the ordinary and necessary rights of ownership over the same, and may not only make ordinary, but such general, repairs and changes as may be necessary or convenient to make the building better subserve its purposes, according to the mode customary in such cases. But if alterations be made materially enhancing the risk, and not necessary to the enjoyment of the premises, or, according to usage, are not the result of the exercise of such ordinary acts of ownership as may fairly be presumed to have entered into the contemplation of the parties at the time when the insurance was effected. In other words, the insured, unless restricted in some way in the policy, may use, protect, and enjoy his property as such property is customarily used, enjoyed, and protected; and in any case of dispute the question will be for the jury whether the insured has transcended a fair exercise of his rights.¹ The only restraints in such a case arise from necessary implication founded on the presumed intentions of the parties, and are such as are called for by the dictates of reason, justice, and public policy. The insurer must be presumed to know that the owner intends to derive benefit from the use and occupancy of his buildings, and to that end he must keep them in tenantable condition. And to put them in tenantable condition prudence may require that, in order to enable him to reap the greatest benefit from his property, he shall do something more than make his building barely inhabitable. Having regard to its appearance and convenience as compared with other property of a similar character in the vicinity, he may make such repairs and alterations as will make it, relatively to other property with which it may come in competition, equally attractive, desirable, and convenient. The contract of insurance is not to be construed so as to restrain the prudent and thrifty from improving their property and their income within the limits of ordinary usage. In the case last cited, where the repairs were of a thorough and extensive character, so much so that the house was given up to the possession of the mechanics engaged therein for several weeks, and was meantime, as is usual in such cases, incumbered with

¹ *Jolly v. Balt. Eq. Soc.*, 1 H. & G. (Md.) 295.

the materials, and strewn with the chips and other waste incident to such repairs, it was contended by the distinguished counsel¹ for the defendants that such repairs avoided the policy, and they likened the case to a deviation in marine assurance, and so it was ruled at the trial. But on appeal the court sent back the case for a new trial, giving a very elaborate opinion, from which we make the following extract:—

“The strictness and nicety which have been wisely adopted in the trial of questions arising on policies of marine insurance are not, to their full extent, applicable to the policies of this society. The former are entered into by the assurer almost exclusively on the statements and information given by the assured himself; in the latter case the insurers assume the risk on the knowledge acquired by an actual survey and examination made by themselves, not on representations coming from the insured. This association, therefore, formed for their individual accommodation and security, cannot, upon any sound principle of construction, be viewed as involving in it a mutual relinquishment of the right of exercising those ordinary necessary acts of ownership over their houses which have been usually exercised by the owners of such property. It hence follows that the insured is authorized to make any necessary repairs in the mode commonly pursued on such occasions.

“But if, by the gross negligence or misconduct of the workmen employed, a loss by fire ensue; or if alterations be made in the subject insured materially enhancing the risk, and not necessary to the enjoyment of the premises insured, or according to usage and custom were not the result of the exercise of such ordinary acts of ownership as in the understanding of the parties were conceded to the insured at the time of insurance, and a loss by fire is thereby produced,—then are the underwriters released from all liability to indemnify for such loss. The policy of insurance here being perfectly silent on the subject, and no general principle or rule of law having been established, in cases like the present, by which to determine whether the repairs or alterations were such as the insured

¹ Wirt and Taney.

had authority to make as being necessary to the user of the property, and whether, if authorized, they were made in the usual and customary way, the proper tribunal to decide those questions is the jury and not the court.

“It appears to have been conceded in argument that ordinary necessary repairs might be made by the insured, but not a thorough repair like the present. The proof of the appellants is ‘that the repairs made on this house were necessary for the purpose of rendering it tenantable,’ and that they were made in the usual way. The bill of exceptions shows that by the word ‘repairs’ both parties meant all that was done to the house. The distinction attempted to be taken has not been supported by any authorities, and in common sense and justice there can be no discrimination between the right to make ordinary repairs and such a thorough repair as is necessary for the purpose of rendering the house tenantable.

“It has been stated by the counsel of both parties that there can be found in the books no adjudication on a policy against fire analogous to the present. It becomes this court, then, maturely to deliberate before they sanction the doctrine contended for by the appellees, which, contrary to justice and the understanding and intention of the parties at the formation of their contract, annihilates all claim to indemnity on the part of the insured, and yet leaves the insurer in the full enjoyment of the premium for responsibility. It perhaps scarcely ever happens that during the period of seven years, the usual term to which such policies are limited, some trifling alteration or addition is not made to the property insured; as a new door or window opened, an additional closet, shelf, or such like fixture erected: any of which acts, if the grounds assumed by the appellees are supported, change the identity of the property, create a new risk, and absolve the underwriters. Indeed, if alterations and additions are, *per se*, a change of the risk, it would follow that the erection of a parapet wall in a city, a substitution of brick for a wooden floor, or a marble for a wooden mantel-piece, or the introduction of a coal-grate in a chimney constructed for wood as the only fuel, though lessening the peril, would discharge the policy; as, according

to the principles of maritime insurance, every *change of the risk* exonerates the underwriter, whether the danger be increased or diminished, or happen the loss from whatsoever cause it may. To infer, without any express provision or necessary implication arising out of the contract itself, or public policy demanding it, that the insured surrendered all right to make such common-place, trivial, unimportant additions to, and alterations of, his property, as its safety or his convenience or comfort might suggest, is a construction too rigorous to be rational ; the effect of which would be to render worse than useless those most useful and indispensable institutions in populous cities, — fire insurance companies, — and give a fatal stab to our enterprising manufacturers, who, if suing for a loss under a policy covering the manufactory and machinery, would be turned out of court without remedy or hope, if perchance the insurer could prove that the most immaterial alteration or improvement were made in his machinery, by substituting the power of the screw for that of the lever, the leather strap for the iron wheel, or the iron for the wooden shaft. But suppose all the rules of marine insurance applicable to the question at bar, can a case be found in which it was ever contended that to add to the equipment of a vessel insured a yard or more of canvas, or an additional cleat or clew-line, was to vacate the insurance ?

“The numerous and warmly litigated questions of deviation and change of risk, which burden the records of courts of justice, bear no analogy to that now under consideration. There, departing from the course of the voyage, or performing it at any other time than that required by the policy, subjects the vessel to different perils than those contemplated by the contracting parties ; a flaw, a whirlpool, a breaker may be encountered in one course of the voyage which would be a cause of neither danger nor alarm at a mile’s distance. The tempests or casualties attending the performance of a voyage to-day bear no similitude or proportion to those attendant on a like voyage to-morrow. But no such total revolution is wrought in the perils to a house insured against fire which has undergone alterations or repairs ; it remains subject to the

same perils, although their degree may be increased or diminished. It becomes a question of *increase*, not of *change* of risk, for the ascertainment of which the jury, and not the court, is the proper tribunal.”¹ And so it was said in *Robinson v. Mercer County Mutual Fire Insurance Company*,² with reference to a change of use from one business to another of greater risk, that if the insured exposed the property to a risk far more hazardous than could have been contemplated by the insurers, good faith required that they should have notice, and if the insured neglected to notify them it would amount to that gross negligence which would defeat a recovery.

§ 225. **Limitation of Risk — Change in Surroundings — Enlargement.** — And the same rules are applicable to changes in the situation of the property insured relative to other property, and other surrounding and incidental circumstances tending to increase the risk. If the contract be silent on this point, any change within the limits of fair and honest dealing is permissible, even though to that change the destruction of the property may be due.³ In *Joyce v. Maine Insurance Company*,⁴ there was the peculiar provision that if the risk was increased by the erection of buildings, or the occupation of neighboring premises, it should be the duty of the insured to give immediate notice thereof to the insurers, that they might terminate the insurance if they should so elect. But no penalty for neglect to give notice was fixed. Such a provision was held to afford to the insurers no ground of defence, in case of its violation, as they cannot assume that they would

¹ And see *ante*, § 219, and *post*, § 230.

² 3 Dutch. (N. J.) 134.

³ *Stebbins v. Globe Ins. Co.*, 2 Hall (N. Y. Superior Ct.), 631; *Grant v. Howard Ins. Co.*, 5 Hill (N. Y.), 16; *Western Farmers' Mut. Ins. Co.*, 1 Handy (Cincinnati Superior Ct.), 325; *Gates v. Madison County Mut. Ins. Co.*, 1 Seld. (N. Y.) 469; *Young v. Washington County Mut. Ins. Co.*, 14 Barb. (N. Y.) 545. In *Howard v. Kentucky and Louisville Ins. Co.*, 13 B. Mon. (Ky.) 282, it is said that in such a case the policy will not be avoided unless the increased risk is the cause of the loss, in which case what was unobjectionable becomes misconduct, a doctrine which cannot be said to be in accordance with the current of opinions, nor is it supported by *Stebbins v. Globe Ins. Co.*, 2 Hall (N. Y. Superior Ct.), 632, the only case cited as an authority. That case says, *obiter*, that if the increase of risk be fraudulent and occasion the loss, it may be a defence.

⁴ 45 Me. 168.

have terminated the insurance if notice of the change had been given. And in point of fact such a provision seems to have no force, the insurers having no better standing in court than they would have without it. Under a somewhat similar provision in a policy which provides that the trustees may declare it null and void if the insured premises be repaired or enlarged so as to render the risk greater, the notice of the trustees does not conclude the insured. He may yet go to the jury on the question whether the enlargement did in fact increase the risk.¹ If any particular act is to be done, as, for instance, if a building contiguous to the property insured is to be removed, this can only be required within a reasonable time; and if a loss occur before the removal, it is for the jury to say whether that reasonable time had elapsed before the loss.²

§ 226. Increase of Risk during Alteration — Increase and Decrease. — But if the policy provides against an alteration and enlargement, which shall increase the risk, a considerable and deliberate alteration and enlargement not incidental to the use of the property will avoid the policy, if it increases the risk during the alteration; and whether the alteration is such a one is for the jury. It seems, however, that ordinary repairs under such circumstances would not.³ In *Heniker v. British American Insurance Company*,⁴ where extensive alterations were made both in the building itself and the surroundings, the court refused to allow the jury to find — there being an actual increase of risk in the building itself — whether, on the whole, taking into consideration any decrease of risk in the surroundings, there was any actual increase of risk. But in *Date v. Gore District Mutual Insurance Company*,⁵ where the changes were all within the building, some calculated to increase the risk and others to diminish it, the court allowed the jury to strike the balance, and say if, on the whole, there was any increase.

¹ *Stetson v. Massachusetts Mut. Fire Ins. Co.*, 4 Mass. 330.

² *Lindsey v. Union Mut. Fire Ins. Co.*, 3 R. I. 157.

³ *Lyman v. State Mut. Fire Ins. Co.*, 14 Allen (Mass.), 227.

⁴ 14 Upper Canada (C. P.) 99.

⁵ 15 Upper Canada (C. P.) 175.

§ 227. **Alteration by others than the Insured.** — Unless the consequences are restricted to the acts of particular persons, an alteration, such as would work a forfeiture of the policy, if made by the insured, is equally fatal if made by a tenant without the knowledge or consent of the insured. That it is made by a tenant is no excuse if contrary to the covenants in the policy. The tenant's possession is the landlord's possession. The latter continues to be the party insured, and the covenants which he enters into remain whether he occupies personally or by tenant.¹ If the insured desires to escape so large a responsibility, he must see to it that the terms of the policy are not so broad as to include the acts of third persons. If he do not do this, he will find, perhaps when it is too late, that he has agreed to be responsible for the acts of third persons.² And upon this principle, an alteration by a mortgagor, after an assignment of the policy, and without the knowledge of the assignor, avoids the policy.³ A change of use, if prohibited on penalty of forfeiture, though made by a tenant without the knowledge of the owner, the insured, is fatal, unless, as is the case in some policies, he is only made responsible for such changes as he permits.⁴ But a tenant is not a proprietor within the meaning of a provision against alterations by act of the proprietor, and an alteration therefore by a tenant, not known to the owner, does not avoid the policy.⁵

§ 228. **Alteration — Premises.** — "Premises" means building, and though there is an alteration in the status of the property insured increasing the risk, it is not an alteration in the "premises" or building in which the property insured is located, and therefore works no forfeiture.⁶ But a provision

¹ Diehl v. Adams County Mut. Ins. Co., 58 Penn. St. 443.

² Shepherd v. Union Mut. Fire Ins. Co., 38 N. H. 232.

³ Kuntz v. Niagara Dist. Fire Ins. Co., 16 Upper Canada (C. P.) 373; Grosvenor v. Atlantic Mut. Ins. Co., 17 N. Y. 391; State Mut. Fire Ins. Co. v. Roberts, 31 Penn. St. 438; Loring v. Manuf. Ins. Co., 8 Gray (Mass.), 28.

⁴ Fire Assoc. of Philadelphia v. Williamson, 26 Penn. St. 196; Howell v. Balt. Eq. Soc., 16 Md. 317; Appleby v. Fireman's Fund Ins. Co., 45 Barb. (N. Y.) 454.

⁵ Paddleford v. Prov. Mut. Fire Ins. Co., 3 R. I. 192.

⁶ Robinson v. Mercer County Mut. Ins. Co., 3 Dutch. (N. J.) 135; Leggett v.

against lighting the "premises" insured in a policy on a stock of goods, refers to lighting the building as well as the merchandise.¹ In *Trench v. Chenango County Mutual Insurance Company*,² it was held that where buildings and personal property were insured in the same policy, and there was a breach of warranty in the failure to state all the buildings within a certain distance, that the breach avoided the policy only as to the building, and that as to the personal property there might be a recovery therefor. But this doctrine was doubted in *Sexton v. Montgomery County Mutual Insurance Company*,³ repudiated in *Kennedy v. St. Lawrence County Mutual Insurance Company*; ⁴ and the case itself, upon this point, was overruled in *Wilson v. Herkimer County Mutual Insurance Company*.⁵

§ 229. **Alterations at Risk of the Insured.**—A provision that alterations and repairs are at the risk of the insured has been said to mean, not that they shall necessarily avoid the contract, but that the assured shall assume the hazard of their increasing the liability of the insurer.⁶ But in *Kingsley v. New England Mutual Insurance Company*,⁷ a condition that the insured should "take all risk from cotton waste," was held to mean that if the fire originated in cotton waste the insured were not to be responsible.

§ 230. **Alteration in Mode of Use.**—Under a policy insuring in general terms a store, building, or factory, without restriction as to the use, or as to the kind of goods to be kept, or as to increase of risk generally, any kind of goods may be kept, and any kind of business carried on, and any change of circumstances made, not expressly prohibited within the limits of good faith and fair dealing; and the fair inference, from the fact that certain kinds of goods and certain kinds of business are

Ætna Ins. Co., 10 Rich. Law (S. C.), 202; *post*, § 241. And see also *Howard Fire and Mar. Ins. Co. v. Cormick*, 24 Ill. 455.

¹ *Stettiner v. Granite Ins. Co.*, 5 Duer (N. Y. Superior Ct.), 594.

² 7 Hill (N. Y.), 122.

³ 9 Barb. (N. Y.) 191.

⁴ 10 Barb. (N. Y.) 285.

⁵ 2 Seld. (N. Y.) 53.

⁶ *Girard Fire and Mar. Ins. Co. v. Stephenson*, 37 Penn. St. 293. And see also *Perry County Ins. Co. v. Stewart*, 19 Penn. St. 45.

⁷ 8 Cush. (Mass.) 393.

classed as hazardous, is, that all others are within the scope of the policy.¹ And in the absence of fraud, it is immaterial whether the newly introduced property, trade, or business is more or less hazardous. Subject only to the restraints of honesty and fair dealing, the insured may use his property as he sees fit, and has towards the insurers no obligation not set down in the contract.² Undoubtedly there may be such a marked and serious change from a risk of the lowest grade to one of the highest, and under such circumstances as obviously not to have been within the contemplation of either party; in fact, converting the property insured into a substantially different subject-matter, and such a change as no fair-minded man would regard, or have a right to regard, as protected under the original policy. In such a case the question would be, whether the change was in degree or kind within such reasonable limits as to be consistent with good faith, or whether it was of such an extravagant character as to evince an utter disregard of the just rights and expectations of the insurers, and an obvious absence of good faith.³

§ 231. *Statement of Present Use generally no Warranty.*—Where the policy merely describes the property insured as used or occupied for a particular purpose, and there is no prohibition of a change in the use or occupation, the insured will only be held to the truth of the statement at the time when the insurance is effected. Such statement will not be construed into a warranty that the subject-matter of insurance shall continue to be so occupied or used during the currency of the policy. Nor will a change in the use or occupancy of the property insured, still keeping within the same character of risk, and not increasing the risk, avoid the policy. If the

¹ *Langdon v. Equitable Ins. Co.*, 1 Hall (N. Y. Superior Ct.), 226; s. c. 6 Wend. (N. Y.) 623.

² *Pim v. Reid*, 6 M. & G. 1; *Shaw v. Robberds*, 6 Ad. & El. 75. In *Sillem v. Thornton*, 3 El. & Bl. 868, Lord Campbell says, *Pim v. Reid* was decided solely on a question of pleading, and doubts the doctrine stated in that case. But the case then under consideration did not at all resemble either of the cases criticised.

³ *Robinson v. Mercer County Mut. Fire Ins. Co.*, 3 Dutch. (N. J.) 134. And see also the observations of Lord Campbell in *Sillem v. Thornton*, 3 E. & B. 868, cited *post*. See Table of Cases.

insurers wish to guard absolutely against change, they must do so by appropriate and positive stipulation.¹ In *Wood v. Hartford Fire Insurance Company*,² the insurance was upon a paper-mill, which was a special memorandum risk, with a prohibition to use for purposes classed as "hazardous or extra hazardous," and a grist-mill was added to, or rather substituted for, a portion of the paper-mill, but without substantially affecting the efficiency of the latter. And it was held that this was not a change from a paper-mill to a grist-mill, and, if it had been, as the grist-mill was also a memorandum risk, it would not have avoided the policy. So a dwelling-house may be used for a boarding-house, if the latter be not included in some class of greater risk.³ A mere exclusion from the risk is not a prohibition which works a forfeiture. Thus, where a policy expressly provides that "gunpowder is not insurable unless by special agreement," and enumerates gunpowder amongst the extra hazardous articles, and further provides that the building insured is privileged to contain extra hazardous merchandise, gunpowder may be kept without prejudice to the right to recover under the policy in case of loss. The effect of the stipulation is merely to exempt the insurers from liability for the gunpowder.⁴

§ 232. **Classification of Risks — Hazardous Goods.** — As not all subject-matters of insurance are equally hazardous, insurers have adopted the plan of classifying the various risks which they assume into special categories, such as not hazardous, hazardous, extra hazardous, specially hazardous, and memorandum articles, or such as are not insurable at all, or only upon special terms, upon which several classes different rates of insurance are charged. It is obvious that an insurance upon one class ought not, and in point of law it does not, cover property in goods in another; and the policy may be, and frequently is, so drawn that if, under a policy insuring

¹ *Smith v. Mechanics' and Traders' Fire Ins. Co.*, 32 N. Y. 399; *Schmidt v. Peoria Mar. and Fire Ins. Co.*, 41 Ill. 295.

² 13 Conn. 533.

³ *Rafferty v. New Brunswick Fire Ins. Co.*, 3 Harr. (N. J.) 480.

⁴ *Duncan v. Sun Fire Ins. Co.*, 6 Wend. (N. Y.) 488.

specifically one class, articles, or modes of use, or practices, embraced in another according to the arbitrary classification of the insurers, are introduced, kept, stored, or permitted, the policy becomes void; as when the policy expressly provides that any particular class or classes of articles shall not be kept, nor any particular practice or mode of use adopted or carried on, unless specially provided for. Thus, if the insurance be in terms upon "stock in trade consisting of merchandise not hazardous," the keeping of hazardous articles, though a part of the general stock, so denominated in the memorandum, will avoid the policy, since the very description of the subject-matter excludes such hazardous articles. The doctrine, in such cases, is well stated in *Richards v. Protection Insurance Company*,¹ where the policy was on "stock in trade consisting of merchandise not hazardous," and where oil, tallow, and glass, enumerated as extra hazardous, were kept as part of the stock, by Shepley, C. J.:—

"Four classes of hazards are named in the conditions annexed to the policy, denominated not hazardous, hazardous, extra hazardous, and memorandum of special risks. The goods insured were by the plaintiffs declared to be of the first class. The goods before named were not of that class, but were of the second class, denominated hazardous. (The plaintiffs procured insurance 'on their stock in trade, consisting of not hazardous merchandise.') Insurance is proposed to be made upon goods contained in these three different classes at different rates of premium. The classes of hazard, and the conditions of insurance annexed to the policy, form a part of the contract between the parties. That contract requires mutual good faith and fair dealing. The law presumes that the parties acted with intelligence. The defendants did not propose to insure goods of the class denominated hazardous at the premium affixed for the class denominated not hazardous. Nor did they propose to insure goods composed partly of one class and partly of the other, at the rate of premium affixed to the least hazardous. This appears from the language used; for 'groceries, with any hazardous articles,' are

¹ 30 Me. 273.

enumerated in the class of hazardous. If the plaintiffs, having procured insurance on their stock in trade, consisting of not hazardous articles, could have kept a stock of goods for sale composed entirely of hazardous articles, and could have recovered for a loss of them by fire, they could do so only by compelling the defendants to become insurers, and to bear the loss for a compensation less than the one affixed to such a class of goods, and less than the one agreed upon by the parties as appropriate to such a risk. So if they could have kept goods for sale composed partly of the first and partly of the second class of risks, and could, after a loss of them by fire, have recovered for them, the defendants would have been compelled to bear the loss for a premium less than that for which they would have knowingly assumed the risk. The injustice in the latter case would not be so great as in the former, but a recovery would be equally unauthorized according to the terms of the contract.”¹

And this doctrine has been recently applied in a case where fireworks and other merchandise, hazardous and extra hazardous, were included in the policy, but which also enumerated fireworks as in a different class. Thus, under a policy insuring “fireworks, ordnance stores, and other merchandise, hazardous and extra hazardous,” “in the second class of hazards,” in which were included fire-crackers and matches, but putting “fireworks” in the specially hazardous category of the third class, it was recently held in New York that keeping that description of fireworks, which was so specially dangerous as by the ordinance to be prohibited storage in the city, if thereby the risk was increased, and it seems if it was not, would avoid the policy. The court said it could not be presumed that it was intended to cover an article so specially hazardous as to be prohibited storage, but only such as were permitted storage and to be sold at retail.² And permission to keep fire-crackers does not give the right to keep fireworks. Thus insurance “on a stock of fancy goods and other articles in his line of business,” &c., and “privileged to keep fire *crackers* on sale,” does

¹ See also *Pindar v. Resolute Fire Ins. Co.*, 38 N. Y. 366.

² Com. of App., Jan. 1873, 2 Ins. L. J. 186.

not authorize the keeping of fire *works*, since fireworks are not included under the license to keep fire-crackers, and they could not be included under the general words, "other articles in his line of business," where by the terms of the policy they are not covered unless specially permitted.¹

§ 233. **Stock in Trade, such as usually kept.**—While, however, as we have seen in the preceding section, if the policy insures only one class of articles and expressly excludes other classes, the keeping of an article in the excluded class, although it be usually kept with the class of goods actually insured, will avoid the policy, yet if the policy describe the property, the stock insured, as such as is "usually kept in a country store," this qualification enlarges the scope of the policy, so that it will attach to and cover memorandum articles, or any articles enumerated in the non-insured classes. The keeping of the memorandum articles is usually made to avoid the policy, unless otherwise provided therein. And this qualification of the description of the subject-matter is equivalent to a provision in the policy whereby the memorandum articles are permitted to be kept and insured.² So where the policy is upon "merchandise such as is usually kept in country stores." Under such a description of the risk, all articles such as can be shown to be usually kept in country stores are covered and protected by the policy, although they may be enumerated in the second classes of risks.³ But in the case of *Macomber v. Howard Fire Insurance Company*,⁴ where the policy was upon a stock in trade described as consisting of "dry-goods, groceries, hardware, crockery, glass and wooden ware, Britannia and tin ware, stoves of various kinds, and *various other wares and merchandise*," and provided that the use of the premises for the purpose of keeping or storing any of the articles denominated hazardous or extra hazardous in the conditions annexed to the policy should avoid the policy unless otherwise especially provided for, and "groceries with any hazard-

¹ *Steamboat v. Relief Ins. Co.*, 13 Wall. (U. S.) 183.

² *Pindar v. King's County Ins. Co.*, 36 N. Y. 648.

³ *Franklin Fire Ins. Co. v. Updegraff*, 43 Penn. St. 353.

⁴ 7 Gray (Mass.), 257.

ous articles," "rags," and other articles were enumerated as hazardous, and were in fact kept upon the premises, the policy was held to be void, although the excepted articles were such as were usually kept in such a stock in trade. Under the modern tendency, however, to interpret liberally in favor of the object of the contract, and, in cases of doubt, strictly against the insurer, it is doubtful if this case would be followed in other courts except upon the same identical facts, and perhaps not in the same court.¹

§ 234. *Permission strictly construed.* — But nothing will be permitted under such an implied permission not fairly within the scope of the general words of qualification; and though a policy prohibiting the use of premises for hazardous purposes may in certain cases cover the keeping for sale of hazardous articles, on the ground, by fair implication, that they are included within the general stock insured, it will not cover the use of such hazardous articles for lighting or other like purpose, if their use be prohibited upon the premises.² It is one thing to appropriate premises to the keeping of a hazardous article for sale, and another to use the hazardous article upon the premises for the purpose of illumination or manufacture. A permission to keep kerosene or gunpowder for sale, it is obvious, cannot be fairly construed into a permission to manufacture or use them upon the premises, since the risks in the respective cases may widely differ.

§ 235. *Hazardous Goods defined.* — Under the prohibition of the storage of hazardous articles, a distinction has been taken between those articles which are deemed hazardous by reason of their greater liability to injury in case of fire, and those which increase the risk of fire; and it has been said that it is only the latter class of articles which can be reasonably regarded as coming within the prohibition, so as to avoid the policy.³

¹ See *Elliot v. Hamilton Mut. Ins. Co.*, 13 Gray (Mass.), 139.

² *Mead v. North Western Ins. Co.*, 3 Seld. (N. Y.) 520; *Westfall v. Hudson River Fire Ins. Co.*, 2 Kern. (N. Y.) 289, reversing s. c. 2 Duer (N. Y. Superior Ct.), 490.

³ *Rathbun v. City Fire Ins. Co.*, 31 Conn. 193.

§ 236. **Classification of Risks — Hazardous Trades.** — If the terms of the policy classifying the risks are defined in the policy itself, this will usually control the meaning. But if at the time of issuing the policy any clause is inserted which is inconsistent with the definition, or renders it doubtful whether it ought to apply, the doubt will be resolved in favor of the insured. For example, a policy provides in writing, after a description of the premises, that they are privileged to be occupied as hide, fat-melting, slaughter, and packing houses, and stores and dwellings, *and for other extra hazardous purposes*. In the second class of risks are included "hazardous No. 2," "extra hazardous No. 2," "extra hazardous No. 3," and "specially hazardous." The occupations specially privileged, such as "hide, fat-melting, slaughter, and packing houses, &c.," do not fall within any definition of "extra hazardous," but do come within the definition of "specially hazardous," to which class distilleries belong, and the building insured was used as a distillery. Upon these facts, and on the ground that where there is an inconsistency between the written and printed portions of the policy, the former must prevail, it was held that the words in the policy, "or *other* extra hazardous purposes," must be taken to mean purposes of the same class, and those like fat-melting houses, &c., as if they read "other like purposes;" and as these were included in "specially hazardous," and distilleries were included in the same class, the use of the building as a distillery was permissible under the policy, though not included in the definition of "extra hazardous" risks, and this term as used in the policy must be qualified accordingly as applicable to the particular case.¹

§ 237. But it has been held that the right to use a building for one hazardous, or extra hazardous, purpose, does not carry with it the right to use it for another additional and different purpose, though it be in the same class of risks.² While a substitution of one use for another in the same class of risks would

¹ Reynolds v. Com. Fire Ins. Co., 47 N. Y. 597.

² Lee v. Howard Fire Ins. Co., 3 Gray (Mass.), 592; Wash. Mut. Ins. Co. v. Merch. and Manuf. Mut. Ins. Co., 5 Ohio St. 450, reversing s. c. 1 Handy (Cin. Superior Ct.), 185.

not increase the risk, an additional use or business would have that effect. Yet it has been held that under a permitted use, an enlarged use for the same purpose is not such an increase of risk as avoids a policy. The increase of risk to have that effect must come from some other source.¹

In the case above cited from Massachusetts, the designated property was "a pail factory, chair-shop, saw-mill, and stores connected therewith," with a provision that the property should not be "applied or used to or for any trade, business, or vocation enumerated in the class of hazards" which was thus expounded by Shaw, C. J.:—

"It is conceded that the premises insured, in addition to the purposes specified in the policy, were, at the time of the fire, appropriated to carrying on a grist-mill. This was a distinct use of one of the buildings insured, not assented to by the defendants, for an occupation included in the classes of hazards, annexed to the policy, as a 'special hazard.' It was therefore a violation of the express stipulation in the policy, and by its terms avoids the contract. Nor does it at all affect the result, that this additional unauthorized use of the premises was for a purpose comprehended within the same class of hazards as that which was specified in the policy, and originally covered by the insurance. The manifest purpose of this stipulation was to prevent any use of the premises for an occupation or business included in any of the classes of risks denominated 'hazardous, extra hazardous, or special,' without the express sanction of the company in writing. It was not intended to limit the assured, in the use of his property, to the same kind of risks as those specified in the policy, and to allow him to change the mode of its occupation, or appropriate the premises to additional uses of the same grade of hazards, at his pleasure. Such is not the import of the language used in the policy, nor would such a construction of it be just or reasonable. To prevent the accumulations of hazardous occupations in the same premises, without their assent, was the object which the defendants sought to accomplish by this agreement. Each distinct

¹ Mayor, &c. v. Hamilton Fire Ins. Co., 10 Bosw. (N. Y. Superior Ct.) 537; Baxendale v. Harvey, 4 H. & N. (Exch.) 445.

use of a building insured for a purpose or business of a hazardous nature might, in the opinion of the insurers, increase the risk by fire; and this might be so, whether the additional use came within the same kind of hazards as that specified in the policy, or belonged to a higher or lower class.”¹

§ 238. And in Massachusetts² it is also held, contrary to the general current of the authorities elsewhere, that an insurance of a general stock which includes hazardous articles, without exception or qualification, is not valid, if elsewhere in the policy there is a provision against keeping any articles denominated hazardous in the classified risks. Bigelow, C. J. : —

“The policy declared on contains a stipulation that it shall cease and be of no force or effect if the assured shall keep on the premises any of the articles, goods, wares, or merchandise denominated hazardous, or extra hazardous, or included among the special hazards enumerated in the memorandum annexed to the policy. It is admitted that oil and sulphur, which are expressly named as hazardous articles, and matches, which are deemed extra hazardous, and all of which subject the building and its contents to an increased rate of premium, were kept on the premises at the time of the fire. This was a clear violation of the stipulation in the contract of insurance, and put an end to it *ex vi termini*. It is urged, on behalf of the plaintiff, that the general description in the application and the policy of the purpose for which the building was occupied, ‘as a provision and grocery store,’ gives the right by implication to keep these hazardous and extra hazardous articles, as a part of the stock appertaining to such business. But there are two difficulties in the way of adopting such an interpretation of the contract, which are insurmountable. In the first place, it militates with the clear and unambiguous terms of the agreement. Hazardous and extra hazardous articles are expressly prohibited, ‘if not specially provided for.’ In the face of this language, it is impossible to hold that a general description of the building, and the purpose for which it is occupied, will allow the assured to keep articles of a dangerous and inflammable

¹ Lee v. Howard Ins. Co., 3 Gray (Mass.), 583.

² Whitmarsh v. Charter Oak Fire Ins. Co., 2 Allen (Mass.), 581.

nature, which are not necessarily comprehended within a fair and reasonable interpretation of the general words used. In the next place, we cannot know, judicially, in the absence of any proof or agreement of the parties, that such articles as oil, sulphur, and matches are usually or properly kept in stores occupied for the sale of groceries and provisions."

This certainly is giving the insurer instead of the insured the benefit of a doubt; and, if carried to its logical results, would permit insurers to take their premiums upon a stock of goods, every article of which is excluded from protection by the very policy which professes to insure it. No one can suppose that any person seeking insurance would ever intentionally make such a contract as that, and it is quite clear that if there are any insurers who would, they ought not to receive any encouragement in a court of justice. If they would, it would be a gross fraud. If they would not, this construction needlessly makes for the parties a contract which neither intended to enter into.

§ 239. **What Keeping or Use avoids the Policy.**— And it may be stated as a general proposition that where, in the designation of the subject-matter of insurance, a stock of goods, or property embarked and used in a particular trade or manufacture, or any branch of business, is stated to be insured without qualification or exception, the policy covers all such special articles of merchandise, processes, practices, subordinate trades, and manufactures as are necessarily or usually included in and incidental to the general subject-matter of insurance, notwithstanding the policy may provide, by a general printed stipulation, that if the premises shall be used for, or appropriated or applied to, the storing or vending of articles, or the carrying on of any trade, vocation, or business denominated hazardous, extra hazardous, or enumerated in the memorandum of special rates, the policy shall be void, and such included and incidental matters are within the excepted specifications. This rule is based upon the presumed intent of the parties that the entire subject-matter as it is, and as it must necessarily exist, if it exist at all, with all its incidents and without essential

¹ And see *Kelley v. Worcester Mut. Fire Ins. Co.*, 97 Mass. 284.

changes, is to be protected,¹ and upon the further presumption that the written special description of the particular subject-matter, wherever inconsistent with special printed clauses, must control.² And this general proposition has been established and illustrated by numerous adjudicated cases. Thus, though the trade of a carpenter is excepted as a hazardous trade, yet, as in the manufacture of china a carpenter is usually employed in the factory and works with bench and tools in making shelves, mouldings, boxes, and racks, in furtherance of the general purpose of the business, such employment will not avoid a policy issued "on buildings occupied as a china factory, and on stock finished and unfinished therein."³

So an insurance of a "printing business" includes all that is essential in conducting such business; and as camphene is a customary and necessary article used in such business, the keeping of that article is permissible under the policy, though it state that "the company will not be liable for a loss by fire occasioned by camphene or other inflammable fluid," and it appear that the fire was occasioned by the accidental dropping of a match into a pan of camphene while in use.⁴ And the same is true under a like insurance and a similar cause of the loss, where the policy provided that "camphene, spirit, gas, or burning fluid cannot be used in the building where insurance is effected unless permission for such use be endorsed in writing on the policy, and is then to be charged an extra premium," though no such premium was endorsed, and no extra premium paid. The use of camphene thus prohibited was held to be its use for the purposes of illumination, and not a use in the processes of the business.⁵ So a policy issued upon "stock

¹ *Delonguemare v. Tradesmen's Ins. Co.*, 2 Hall (N. Y. Superior Ct.), 589.

² *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72; *Goss v. Citizens' Ins. Co.*, 18 La. An. 97; *Benedict v. Ocean Ins. Co.*, 31 N. Y. 389; *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492; *Citizens' Ins. Co. v. McLaughlin*, 53 Penn. St. 425; *Cushman v. North Western Ins. Co.*, 34 Me. 487; *Moore v. Protection Ins. Co.*, 29 Me. 97; *Leggett v. Ætna Ins. Co.*, 10 Rich. Law (S. C.), 202.

³ *Delonguemare v. Tradesmen's Ins. Co.*, 2 Hall (N. Y.), 589; *Loundsbury v. Protection Ins. Co.*, 8 Com. 459.

⁴ *Harper v. City Ins. Co.*, 22 N. Y. 441, affirming s. c. 1 Bosw. (N. Y. Superior Ct.) 520.

⁵ *Harper v. Albany Mut. Ins. Co.*, 17 N. Y. 194. The keeping of camphene for sale was also prohibited in the policy.

as rope manufactures" covers the business of rope-making, though that business is excluded as specially hazardous.¹

So insurance "as a manufacturer of brass clock works" permits the use of all such articles as are ordinarily employed in that manufacture, and the keeping them on hand, and even the making them for that purpose, if such be the ordinary course of the business, although the use or keeping of such articles be prohibited by the printed terms of the policy as extra hazardous.² So where the written portion of the policy insured a steam-engine, but the printed condition excepted losses "caused by or consequent on the bursting or collapsing of a steam-boiler or steam-pump," it was held that, there being a repugnancy between the written and printed portions of the policy, the written portion must prevail.³ So "goods usually kept in a country store" covers clean white cotton rags, it being shown that such rags usually form part of the stock of country stores, though in the application which was made part of the contract, the question whether "cotton or woollen waste or rags" were kept in or near the premises was answered in the negative.⁴ So a policy on "such goods as are kept in a general retail store" covers such an amount of gunpowder as is usually kept for sale in such a store, though excepted by the printed condition of the policy from being deposited, stored, or kept.⁵ "Oils and other spirituous liquors" may be kept by a "grocer," the business of a grocer not being specified in the memorandum of excepted risks, though the specific articles are.⁶ So a policy on a stock of "dry goods" covers cotton in bales, if ordinarily a portion of such a stock, though the latter are enumerated as extra hazardous.⁷ So

¹ Wall v. Howard Ins. Co., 14 Barb. (N. Y.) 383. It seems that "hackling hemp and spinning it" is not "rope making." *Ib.*

² Bryant v. Poughkeepsie Mut. Ins. Co., 21 Barb. (N. Y.) 154; s. c. 17 N. Y. 200.

³ Hayward v. North Western Ins. Co., 19 Abb. Pr. (N. Y.) 116.

⁴ Elliot v. Hamilton Mut. Ins. Co., 13 Gray (Mass.), 139. This case, however, was rather one of representation, and turned upon the point that "cotton or woollen waste or rags" referred to waste or oily rags, such as are easily inflammable, rather than clean white rags.

⁵ Phoenix Ins. Co. v. Taylor, 5 Minn. 492.

⁶ New York Equitable Ins. Co. v. Langdon, 6 Wend. (N. Y.) 623.

⁷ Moore v. Prot. Ins. Co., 29 Me. 97.

insurance on a "steam-flouring mill" covers and permits a corn-mill in connection with a kiln for drying corn meal, if they are a usual or appropriate part of the business insured.¹ But the introduction and prosecution for months of the business of cooping into an unused flour-mill, is an appropriation to another purpose, and, if it increases the risk, avoids the policy.² And, generally, if the use or trade, or articles kept on storage or for sale, is not incidental to that which is the subject-matter of insurance, the policy not only does not cover it but is void. Hat-bleaching has been held to be no part of the dry-goods business.³

§ 240. Upon the same general principles when, from the character of the building insured, and the use made of it, it is necessary to have workmen constantly engaged in repairing, in order to keep it in proper condition for the business done therein, the employment of such workmen is not a breach of the condition that "working of carpenters," &c., altering or repairing will vitiate the policy. Such condition has for its object to prohibit such hazardous use as is generally denominated a "builder's risk," which arises from placing the building in the possession or under the control of workmen for alteration or repairs, but does not refer to such indispensable repairs as are necessary to the proper conduct of the business to which the building is appropriated.⁴

§ 241. **Use means habitual Use.**—Use for any purpose prohibited means habitual use.⁵ The introduction of a tar barrel, and lighting a fire for the purpose of repairing the building insured, is not in contravention of the terms of a policy which provides that fire shall not be kept nor hazardous goods deposited on the premises.⁶ Nor is insurance upon a "kiln for drying corn in use" vitiated by the fact that the insured in a single instance allowed the cargo of a vessel laden with bark,

¹ Wash. Mut. Ins. Co. v. Merch. and Manuf. Ins. Co., 5 Ohio St. 450.

² Harris v. Columbian Mut. Ins. Co., 4 Ohio St. 285.

³ Merrick v. Prov. Ins. Co., 14 Upper Canada (Q. B.), 439.

⁴ Franklin Fire Ins. Co. v. Chicago Ice Co., 36 Md. 102.

⁵ Dobson v. Sotheby, 1 Moo. & Mal. 90; Barrett v. Jermy, 3 Wels. Hurl. & Gor. 535; Leggett v. Ætna Ins. Co., 10 Rich. Law (S. C.), 202.

⁶ Ibid.; Dobson v. Sotheby, 1 Moo. & Mal. 90; s. c. 22 E. C. L. 481.

which had sunk near by, to be dried at the kiln. It is not a change of business in the sense of the terms of the policy, which means permanent change.¹ Repairing the building insured by the ordinary methods, and occupying it for that purpose, is not an appropriation, use, or application thereof for carrying on a trade or business of house building or repairing.² Nor is the making a fire therein for the purpose of extracting fat from spoiled meat.³ The mixing and keeping of paints in the barn, by the insured, for the purpose of painting his house, is an ordinary and permissible use of the barn, although it is described as used for "hay, straw, grain unthrashed, stabling and shelter."⁴ In an insurance upon a house in process of building, a statement, in reply to an inquiry, that there are no stoves in it, means that no stove is to be habitually kept and used in it as stoves are ordinarily used in a dwelling-house. The use of a stove for a few days subsequent to the effecting of the insurance, and for a purpose connected with the finishing of it, is no violation of the warranty,⁵ or of a condition against alteration in use.⁶ The casual use of camphene and friction-matches by workmen employed about the premises, without the knowledge of the insured and contrary to his orders, is no violation of a proviso that they shall not be kept, used, or sold. A use to work forfeiture must be a use known to, and permitted by, the insured.⁷ The occasional use of articles denominated hazardous, or the occupation of the premises insured for purposes called hazardous in the conditions annexed to a policy, will not avoid the policy if such use and occupation appertain to the general subject-matter of the risk.⁸ But a description of an insured building as "occupied as a store-house," will not admit of the introduc-

¹ *Shaw v. Robberds*, 6 Adolph. & Ell. 75 (E. C. L. 12).

² *O'Neill v. Buffalo Fire Ins. Co.*, 3 Comst. (N. Y.) 122; *Grant v. Howard*, 5 Hill (N. Y.), 10.

³ *Gates v. Madison County Mut. Ins. Co.*, 1 Seld. (N. Y.) 469.

⁴ *Billings v. Tolland County Mut. Fire Ins. Co.*, 20 Conn. 139.

⁵ *Williams v. New England Mut. Fire Ins. Co.*, 31 Me. 219.

⁶ *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 20.

⁷ *Farmers' and Mechanics' Ins. Co. v. Simmons*, 30 Penn. St. 299.

⁸ *Merch. and Manuf. Ins. Co. v. Washington Ins. Co.*, 1 Handy (Ohio), 181.

tion into it of the business of hackling hemp and spinning it into rope yarn.¹

§ 242. *Storing*. — “Storing” has been defined to mean “keeping for safe custody to be delivered out again in the same condition, substantially, as when received,” and to apply only “when the storing or safe-keeping is the sole or principal object of the deposit, and not when it is merely incidental, and the keeping is only for the purpose of consumption. Wine sent to a warehouse to be kept and returned when called for is “stored.” But wine kept in one’s cellar or garret, to be sold or consumed as occasion may require, is not. Thus, a grocer, insured as such, may keep wine and oil for sale, although they are classed as hazardous articles; and by the terms of the policy hazardous articles are not to be “stored.”² It is the appropriation to the business of storing that is prohibited in a policy that inhibits the use of the insured premises for the purpose of storing and keeping certain specified articles, while insuring a stock of goods in which those articles are ordinarily found. And it seems that raw material used in a manufacture, and brought into and kept in the room where it is to be manufactured, is not stored therein in the sense of the policy which prohibits the use of any part of the premises for storing such articles.³ So, if the material has been casually and temporarily left in a room, without any purpose to appropriate that room to the use of keeping and storing it.⁴ To use for “keeping and storing” is to appropriate the premises to that use as a principal use, and not incidentally and for some other purpose to which the keeping and storing is necessarily incidental. Articles kept in a store are kept and stored for sale, but the use of the building is for selling and not for keeping and storing.⁵ Oil, turpentine, and paint may

¹ *Wall v. East River Mut. Ins. Co.*, 1 Seld. (N. Y.) 370.

² *N. Y. Equitable Fire Ins. Co.*, 1 Hall (N. Y.), 226; s. c. 6 Wend. (N. Y.) 623; *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492; *Mayor, &c. v. Hamilton Ins. Co.*, 10 Bosw. (N. Y.) 537; *Rafferty v. N. B. Fire Ins. Co.*, 3 Harr. (N. J.) 480.

³ *Vogel v. People’s Mut. Fire Ins. Co.*, 9 Gray (Mass.), 23.

⁴ *Hynds v. Schenectady County Mut. Ins. Co.*, 16 Barb. (N. Y.) 119; s. c. affirmed, 1 Ker. (N. Y.) 554.

⁵ *Moore v. Prot. Ins. Co.*, 29 Me. 97; *Leggett v. Ætna Ins. Co.*, 10 Rich. Law (S. C.), 202; *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492.

be kept and stored in a building in process of erection on which they are to be used, but the building can in no proper sense be said to be used for keeping and storing them.¹ Gunpowder being one of the prohibited articles, it appeared that the insured had kept it for sale in his general stock. At the time of insurance he had some still remaining on hand, but it was not offered for sale after the policy issued; and it was held that this was neither a storing nor a keeping for sale.² So where a party insured a building which had been used for dressing flax, but before effecting insurance the machinery had been removed from the building, though some unbroken flax — a prohibited article — remained in one corner of a room till the time of the fire, it was held that this did not constitute a use of the building for the purpose of storing the flax, there being no intention of having it regularly stored or kept there except temporarily.³ In *Dobson v. Sotheby*⁴ the language of the policy provides against the use of the buildings to “store or warehouse” any hazardous goods, and it was held that the introduction of a barrel of tar and its use in repairing the building was no violation of the conditions of the policy. But the Supreme Court of Massachusetts has repeatedly taken it for granted that the keeping of an article for sale in a general stock was an appropriation, application, and use of the premises for the purpose of keeping and storing of the particular article.⁵ In neither case, however, was the point discussed or raised, and the cases are certainly counter to the authorities where the point has been deliberately made. So the introduction of the prohibited article for a special purpose, even though that purpose be the destruction of the building insured, is not a “storing” within the meaning of the policy; as where gunpowder is introduced into a building for the purpose of blowing it up in order to stay the progress of a conflagration.⁶

¹ *O'Neill v. Buffalo Fire Ins. Co.*, 3 Comst. (N. Y.) 122.

² *Protection Ins. Co. v. Harmen*, 2 Ohio St. (22 Ohio) 452.

³ *Hynds v. Schenectady County Mut. Ins. Co.*, 16 Barb. (N. Y.) 119; s. c. affirmed, 1 Ker. (N. Y.) 554.

⁴ 1 Moody & Malken, 90.

⁵ *Whitmarsh v. Charter Oak Fire Ins. Co.*, 2 Allen (Mass.) 23; *ante*, § 238; *Macomber v. Howard Fire Ins. Co.*, 7 Gray (Mass.), 257; *ante*, § 234; *Lee v. Howard Fire Ins. Co.*, 3 Gray (Mass.) 583; *ante*, § 237.

⁶ *City Fire Ins. Co. v. Corlies*, 21 Wend. (N. Y.) 367.

§ 243. A very nice point was made and sustained by the Supreme Court of South Carolina in a case where the policy provided that "the keeping of gunpowder for sale or on storage upon or in the premises insured, should render the policy void." The insurance was upon "the stock of goods and merchandise contained in the applicant's store," a part of which consisted of gunpowder. But it was contended, and so held, that the word "premises" referred to buildings insured, and as there was no insurance upon the building the gunpowder was not kept "upon or in the premises insured," within the meaning of the stipulation.¹ And upon the same principle a false representation as to occupancy of a building not itself insured was held immaterial.² A general prohibition of a particular article without special permission, followed by a subsequent provision that no more than a certain amount of the same article, and that in a certain way, shall be kept, will be considered as modified by the latter so as to permit of the keeping the limited amount in the mode provided without special permission.³

§ 244. Increase of Risk — Change in surrounding Circumstances. — Where parties have entered into an agreement, nothing beyond the terms of the agreement can be required of either party except good faith. And if a change in the use of the premises actually insured will not work a forfeiture, *a fortiori* a change in the use of adjoining premises will not.⁴ If there be no want of good faith in bringing about or permitting any change increasing the risk, it is immaterial whether the change causes the loss. But if there be bad faith, and the loss is chargeable to the act done or permitted, then it becomes a defence to the action to recover the loss. The grounds upon which this principle rests are thus stated in *Stebbins v. Globe Insurance Company*:⁵ —

"The contract of insurance has its foundation in the mutual

¹ Leggett v. Aetna Ins. Co., 10 Rich. Law (S. C.), 202.

² Howard Fire and Mar. Ins. Co. v. Cornick, 24 Ill. 455.

³ Bowman v. Pacific Ins. Co., 27 Mo. 152.

⁴ Western Farmers' Mut. Ins. Co. v. Miller, 1 Handy (Superior Ct., Cincinnati), 325.

⁵ 2 Hall (N. Y. Superior Ct.), 631.

good faith of the parties. If the assured violates that good faith in any circumstance entering into the creation of the contract, it is no doubt void. But if, subsequently to its formation, he acts with fraud or gross negligence, or in bad faith, with respect to the subject-matter insured, his rights under the contract are not impaired unless the loss which he seeks to recover is the result of his own misconduct. It is a general principle that no man can derive a right of action against another from his own violation of duty, or from his own illegal acts. Thus there is no stipulation in this policy that the assured shall not set fire to the buildings insured. If he had done so he could not recover the loss, on the ground not that he had violated any stipulation in the contract, but that he could not profit by the consequences of his own illegal or fraudulent acts. If, however, he had set fire to an adjoining building with the intent to consume the one insured, but no injury to that had in fact ensued, it could not have been contended that the policy was thereby rendered void, notwithstanding the act would have been in the highest degree a violation of the good faith which was pledged to the insurers, that the risk should not be increased by any act of the assured. An erection of buildings on vacant ground by the assured subsequently to the policy and contiguous to those insured, whereby the risk is increased, stands upon the same principle. If buildings thus erected should be removed before the occurrence of any loss, it could not be maintained that the policy would be thereby annulled. The act not being in violation of any express stipulation in the policy, and not resulting in any actual injury to the insurers, the law would regard it as harmless and rightful; and if this be so, it seems clearly to follow that the continuance of such erections (as in the case now before us) until the fire, cannot change the legal consequences of the act of erecting them, if they have in no way been the cause of the loss. The act of the assured in erecting them may have been a breach of an implied understanding between the parties that the situation of the insured premises, with respect to the contiguous buildings, should not be changed by the act of the assured so as to increase the risk; but if

such increase of risk has in fact been without injury to the defendants, the policy is not affected by it."

§ 245. **Prohibited Use — Suspension of Policy — Smoking — Tavern-keeping — Bawdy-house.** — Some policies in prohibiting the use of the buildings insured for certain purposes provide that they shall be void only so long as the prohibited use continues. In such cases, of course, although there may have been during the currency of the policy a prohibited use, yet if that use is not in fact made at the time of the fire, but has before that happens been discontinued, there is no forfeiture.¹ But under a policy insuring property described as a "back building and stores," and prohibiting certain hazardous uses, the introduction of a prohibited use or business will avoid the policy whether continued to the time of the fire or not.² So if in the description itself one use is permitted but another forbidden, as where a building is insured to be occupied as a store, but not as a coffee-house.³ So also if there be a prohibition against the introduction of any specific article, as, for instance, steam or a steam-engine, the introduction of the prohibited thing, whether permanently or temporarily, — the policy being made void by its terms by such introduction, — and whether for a longer or shorter time, is equally fatal.⁴ An agreement that smoking shall be prohibited, and a statement that smoking is not allowed upon the insured premises, means simply that the insured will not himself smoke on the premises, and will prohibit, and take reasonable precautions to prevent others from smoking there.⁵ If the policy stipulates against an occupation of the premises for purposes considered hazardous at any time when a fire shall happen, but does not define the meaning of the word, nor contain any class of risks denominated hazardous, nor add the test of increase of risk,

¹ *Loundsbury v. Prot. Ins. Co.*, 8 Conn. 459; *N. Y. Fire and Mar. Ins. Co. v. Wetmore*, 32 Ill. 221; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9.

² *Mead v. N. W. Ins. Co.*, 3 Seld. (N. Y.) 530.

³ *Lawless v. Tenn. Mar. and Fire Ins. Co.*, Circuit Ct. St. Louis, Mo. 1852, cited by Angell, *Ins.* § 169 n.

⁴ *Glen v. Lewis*, 8 Wels. Hurl. & Gor. (Exch.) 607.

⁵ *Ins. Co. of North America*, 50 Ill. 12; *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213.

it will of course be for the jury to determine not only whether there has been a change of use, but whether that change is considered hazardous, and this would depend upon the degree of the increase of the risk.¹ Keeping a bar-room in a boarding-house is not "tavern-keeping;"² nor is the keeping a bawdy-house in a house insured and described as a "dwelling-house" a concealment, though the house was set on fire and destroyed by a mob, such a result not being the natural consequence of such a use.³

§ 246. **Increase of Risk — Unlawful Use.** — That unlawful use of the premises insured which will avoid a policy stipulating against it, is not a mere casual use, or permission of use, for an unlawful purpose, or the doing of a particular unlawful act therein, as the commission of a misdemeanor or even a felony, — it must be in some substantial sense a use for the alleged unlawful purpose. But where there is a constant, exclusive, and habitual use of the insured premises for unlawful purposes, as where the tenant of the insured for three months prior to the fire stored and kept intoxicating liquors for sale, and nothing else, this was held to violate a proviso that the policy should be void if the building insured should be "occupied or used for unlawful purposes," although the owner and insured had no knowledge in fact of such unlawful use.⁴ On the other hand, it has been held in Michigan,⁵ that, under a prohibition against keeping any article "subject to legal restriction" from being kept in "greater quantities or in a different manner than prescribed by law," the illegal keeping of spirituous liquors for sale will not avoid the policy, and the illegally kept liquors may be insured. The court in that case say: "It is claimed that if these liquors can be allowed to be included in the policy, the policy will be to all intents and purposes insuring an illegal traffic; and several cases were cited involving marine policies on unlawful voyages, and

¹ *Robinson v. Mercer County Mut. Fire Ins. Co.*, 3 Dutch. (N. J.) 134.

² *Rafferty v. N. B. Fire Ins. Co.*, 3 Harr. (N. J.) 480.

³ *Lochner v. Home Mut. Ins. Co.*, 17 Mo. 247; s. c. 19 Mo. 628.

⁴ *Kelly v. Worcester Mut. Fire Ins. Co.*, 97 Mass. 284.

⁵ *Niagara Fire Ins. Co. v. De Graff*, 12 Mich. 124.

lottery insurances, which have been held void on that ground. These cases are not at all parallel, because they rest upon the fact that, in each instance, it is made a necessary condition of the policy that the illegal act shall be done. The ship being insured for a certain voyage, that voyage is the only one upon which the insurance would apply, and the underwriters thus become directly parties to an illegal act. So insuring a lottery ticket requires the lottery to be drawn in order to attach the insurance to the risk. If this policy were in express terms a policy insuring the party selling liquors against loss by fire or forfeiture, it would be quite analogous. But this insurance is only upon property, and the risks insured against are not the consequences of illegal acts, but of accident. Our statute does not in any way destroy or affect the right of property in spirituous liquors, or prevent title being transmitted, but renders sales unprofitable by preventing the vendor from availing himself of the ordinary advantages of a sale, and also affixes certain penalties.¹ By insuring this property, the insurance company have no concern with the use the insured may make of it, and, as it is susceptible of lawful uses, no one can be held to contract concerning it in an illegal manner, unless the contract itself is for a directly illegal purpose. Collateral contracts, in which no illegal design enters, are not affected by an illegal transaction with which they may be remotely connected.”²

§ 247. **Occupancy — Dwelling-house — Mode of Occupancy.** — If in the application the property on which insurance is sought is denominated a “dwelling-house,” without any stipulation touching its use or occupation, this is mere description, and amounts neither to a representation that it is occupied, nor a warranty that it shall be. If the property be denominated as the house occupied by a particular person, this is at most a warranty that it is, and not that it shall continue to be so occupied. And in neither case does the fact that the houses are

¹ *Hibberd v. People*, 4 Mich. 125; *Bagg v. Jerome*, 7 Mich. 145.

² The court cites, in support of their last proposition, *Ocean Ins. Co. v. Polleys*, 13 Pet. (U. S.) 157; *Armstrong v. To'er*, 11 Wheat. (U. S.) 258, which were respectively cases of evasion of registry and revenue laws.

for a time unoccupied — whether at the time of the insurance¹ or afterwards² — vitiate the policy, even though the loss happen while the dwelling-house is vacant. And this is so, although the application and conditions are made part of the policy, and one of the conditions provides that the insurance shall be void and of no effect if the risk shall be increased by any means whatever within the control of the insured.³ So, if stated to be used and occupied for farmer's use.⁴ So if a building is stated to be fastened up, and only occupied for a certain purpose, though the statement be made a warranty by the terms of the policy, it is only a warranty of the situation at the time of effecting the insurance, and not that it shall so continue during the whole term of the risk. It would be unreasonable, if not absurd, to suppose that the owner of a building which may be usefully and profitably occupied could intend by such a stipulation to deprive himself of such use and profit during the entire term covered by the policy, unless so explicitly stated. That such is not the intention of the insurers is to be inferred, especially if they provide elsewhere in the policy against an increase of risk.⁵ Nor is it material that there is a change in tenants⁶ from a careful to a negligent one,⁷ or from a reputable to a disreputable one.⁸ In *Catlin v. The Springfield Fire Insurance Company*,⁹ the property was described as "at present occupied by one Joel Rodgers as a dwelling-house, but to be occupied hereafter as a tavern, and is privileged as such," and the latter clause was held not to be either a warranty that the house should be occupied as a tavern, or even a representation of the intention to occupy it as such. The insured was the mortgagee, and if the language could fairly be treated as his, it would import no more than a representation. But

¹ *Diehl v. Adams County Mut. Ins. Co.*, 58 Penn. St. 443.

² *O'Neil v. Buffalo Fire Ins. Co.*, 3 Comst. (N. Y.) 122.

³ *Joyce v. Maine Ins. Co.*, 45 Me. 168.

⁴ *Gamwell v. Merchants' and Farmers' Mut. Fire Ins. Co.*, 12 Cush. (Mass.) 167.

⁵ *Blood v. Howard Fire Ins. Co.*, 12 Cush. (Mass.) 472.

⁶ *Hobson v. Wellington Dist. Ins. Co.*, 6 Upper Canada (Q. B.), 536.

⁷ *Gates v. Madison County Mut. Ins. Co.*, 1 Seld. (N. Y.) 469.

⁸ *Lyon v. Com. Ins. Co.*, 2 Rob. (La.) 266.

⁹ 1 Sumner (U. S. C. C.), 435.

the language cannot in strictness be treated as the language of the mortgagee. He cannot be presumed, in the absence of evidence, to intend to take possession and control of the property. It is to be privileged, by the company of course, to be used as a tavern. This is their language, and imports a license or privilege granted by the insurers to use the house as a tavern if the insured so desire, but by no means an undertaking on his part that it shall be so used. And in *Boardman v. N. H. Mutual Fire Insurance Company*,¹ it was held that such descriptive words in an application were not warranties, but mere representations, although expressly made part of the contract by reference; on the ground that it could not reasonably be supposed that the insurers could intend to make the validity of the policy dependent upon so trifling a matter as a mere change of tenants, or a change from occupancy to vacancy, unless they said so expressly. Nor is a statement that the insured buildings are "occupied as stores" a warranty that they shall all be occupied.² A change from occupation to disuse is a change in the "use or occupation" of the property within the meaning of chapter 34 of the Laws of Maine, 1861.³

§ 248. *Occupancy — Vacation.* — A statement in the application that the unoccupied building insured is to be occupied by a tenant, is not a warranty that it shall be so occupied, but rather the representation of the insured's expectation that it will be so occupied, and not by himself, and a reservation of the right to have it so occupied, to avoid the inference that it is to remain unoccupied. Nor does it exclude the insured from the right to occupy. This is inferable from the obvious diffi-

¹ 20 N. H. 551.

² *Carter v. Humboldt Fire Ins. Co.*, 17 Iowa, 456.

³ *Cannell v. Phoenix Ins. Co.*, 59 Me. 582. That statute is as follows: "No insurance company shall avoid payment of a loss by reason of incorrect statements of value or title, or erroneous description by the insured in the contract of insurance, if the jury shall find that the difference between the property described and as really existing did not contribute to the loss, or materially increase the risk; any change in the property insured, its use or occupation, or breach of any of the conditions or terms of the contract by the insured, shall not affect the contract unless the risk was thereby materially increased." Laws of 1861, c. 34.

culty of fixing any time when it could be alleged there was a breach of the warranty, if it were a warranty.¹ Perhaps if the time were fixed within which it should be occupied the rule would be different.² If in the description the recital is that the property insured is only to be used or occupied in a certain way, or not to be used or occupied at all, this is an agreement, and must be complied with;³ and so it is if the policy provides that unoccupied buildings must be insured as such, and in case the building becomes vacant the insured shall give notice, or forfeit his right to recover.⁴ Not unfrequently it is provided that if the occupant personally vacates the premises insured the policy will be void, unless immediate notice be given to the insurers and an additional premium paid. In such case, vacation without notice and payment of the additional premium is of course fatal to the right of the insured to recover for a loss, and notice to a special agent, among other things, authorized to receive cash for premiums, is not sufficient, if the premium be not also paid. It is indeed doubtful if the payment of the premium would help the matter, as it is questionable whether an agent to receive premiums fixed by the company would have the right to fix the rate of additional premium.⁵ If there is no express stipulation that the premises shall not be left vacant, the policy will not be void, although the risk be increased by the fact that they are so left, unless perhaps when they are purposely so left.⁶ So, although there be an express oral promise, if the promise be in good faith.⁷ There is no implied obligation to keep a watch in or about a vacant house.⁸ But when by express

¹ *Hough v. City Fire Ins. Co.*, 29 Conn. 101; *Catlin v. Springfield Fire Ins. Co.*, 1 Sumner (U. S.), 434; *Herrick v. Union Mut. Fire Ins. Co.*, 48 Me. 558.

² *Bilbrough v. Metropolitan Ins. Co.*, 5 Duer (N. Y.), 587.

³ *Stout v. City Fire Ins. Co.*, 12 Iowa, 371.

⁴ *Wustum v. City Fire Ins. Co.*, 15 Wis. 138; *Harrison v. Same*, 9 Allen (Mass.), 231.

⁵ *Harrison v. City Fire Ins. Co.*, 9 Allen (Mass.), 231; *Wustum v. City Fire Ins. Co.*, 15 Wis. 138.

⁶ *Gamwell v. Merchants' and Farmers' Mut. Fire Ins. Co.*, 12 Cush. (Mass.) 167.

⁷ *Kimball v. Ætna Ins. Co.*, 9 Allen (Mass.), 540; *Stout v. City Fire Ins. Co.* of New Haven, 12 Iowa, 371.

⁸ *Soye v. Merchants' Ins. Co.*, 6 La. An. 761.

terms, if the risk is increased in any manner by the permission of the insured during the currency of the policy, it is void, the voluntarily leaving a house, occupied when insured, unoccupied for such a length of time and under such circumstances as to warrant an inference that it was purposely so left unoccupied, will have the effect to avoid it.¹

§ 249. **Change of Possession — Occupancy — Vacation.** — Under a provision that the policy shall cease to protect the property from the time when it shall be “levied on or taken into possession or custody under an execution, or any proceeding in law or in equity,” an unlawful levy, made upon the property as that of a person other than the insured, will not have the effect to invalidate the policy.² And although the mere notice of the levy, by the officer charged with the duty, to the defendants, — the insured, — without taking the property into possession or custody, may be good as a levy, it will not be sufficient to defeat the policy. It is an actual, not a constructive change of possession that is contemplated.³ And the ordinary going out of one tenant is not a change of tenancy till the advent of a new tenant; nor does the vacancy during the intervening time constitute a change of occupancy. Thus, under a provision that “if any change be made as to the tenants or occupancy of the premises,” without notice, the policy shall be void, the fact that the premises were unoccupied at the time of the fire, the tenant having vacated the premises but a few days previous, and no new tenant having taken possession, no notice at all is necessary until the change takes place; that is, until a new tenant is in possession. A mere surrender of one tenant without the entry of another is not such a change as is contemplated by the words of the proviso.⁴ Nor is the leaving a building unoccupied after it has been vacated by a tenant an alteration of the use to which the

¹ *Luce v. Dorchester Ins. Co.*, 105 Mass. 297.

² *Phila. Fire and Life Ins. Co. v. Mills*, 44 Penn. St. 241.

³ *Com. Ins. Co. v. Bergen*, 42 Penn. St. 285.

⁴ *McAnally v. Somerset County Mut. Ins. Co.*, 2 Pittsburgh Rep. (Crumrine) 189.

premises are applied.¹ On the other hand, it is not sufficient to constitute occupancy, within the meaning of a stipulation that the property insured — a trip-hammer shop — shall not remain unoccupied over thirty days, that the tools remain in the shop, and an employé of the insured goes almost every day through the shop to look around and see if every thing is right, but no practical use is made of the building.²

§ 250. *Limitation of Risk — Care — Watch.* — When it is warranted that a watchman shall be kept on the premises, this means that a watchman is to be kept in the manner in which men of ordinary care and skill in similar departments keep a watchman; and to show this, evidence of the usage in similar establishments may be introduced. A substantial compliance, though not a constant watch uninterrupted either by unknown accident or negligence, is required.³ And an occasional leaving of the premises to look after property on the opposite side of the street is no breach of the warranty.⁴ What is a “suitable watch” depends upon the circumstances.⁵ In Massachusetts, the questions arose in *Parker v. Bridgeport Insurance Company*,⁶ what constituted a good, suitable, or proper watch; and whether such an one was kept, and at the times required by the terms of the contract, — and were held to be questions for the jury. The case was thus stated by Shaw, C. J.: —

“In a policy of insurance upon a saw-mill, the assured covenanted ‘that the representation given in the application for this insurance contains a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property insured, so far as the same are known to the assured and material to the risk; and that if any material fact or circumstance shall not have been fully represented, the risk hereupon shall cease and determine, and the policy be null and void.’ The applicant, to the ques-

¹ *Hawkes v. Dodge County Mut. Ins. Co.*, 11 Wis. 188.

² *Keith v. Quincy Mut. Fire Ins. Co.*, 10 Allen (Mass.), 228.

³ *Crocker v. People's Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 79.

⁴ *Hovey v. Am. Mut. Ins. Co.*, 2 Duer (N. Y. Superior Ct.), 554.

⁵ *Percival v. Maine Mut. Ins. Co.*, 33 Me. 242.

⁶ 10 Gray (Mass.), 202.

tions, 'Is a watch kept upon the premises during the night? is any other duty required of the watchman than watching for the safety of the premises?' answered, 'A good watch kept; men usually at work. Watchmen work at the saws;' and answered in the negative this question: 'Is the building left alone at any time after the watchman goes off duty in the morning till he returns to his charge in the evening?' In fact, no watch was ever kept on the premises after twelve o'clock on Saturday, or at all on Sunday, night, other than the workmen sleeping there, who were instructed to, and habitually did, examine the mill with reference to fires before going to bed; and the fire occurred on Sunday night, when no one was on the premises.

"The inquiry is not as to watchman or watchmen; the more generic term 'watch,' embracing the various modes of watching such a factory. It was a factory the machinery of which was driven by water; no steam was used; it was not a manufactory of metals, or one that required the use of fire.

"Upon an examination of the bill of exceptions, it appears to us that there were several points ruled positively as matter of law which should have been left to the jury; and this on several grounds. In the first place, if there was not an absolute stipulation that a watch should be kept during the whole of every night in the week, such a watch as would be necessary and proper to the safety of such an establishment against fire, then it was a question of fact whether the watch actually kept was or not a good and suitable watch.¹

"If there is a real difference between the requirement of a watch immediately after a working day, and Sunday, which is a day of rest, then a watch might be deemed good and adequate on Sunday night, which might not be after a working day. The causes of danger of fire in a factory, we suppose, are lamps and stoves, after work is done; friction, arising from the great velocity and irregular action of working machinery; spontaneous combustion; incendiaries; and lightning. The last, of course, no watch would affect; the three first, perhaps the

¹ Crocker v. People's Mut. Fire Ins. Co., 8 Cush. (Mass.) 79.

greatest, would be likely to disclose themselves within a few hours after the close of work, and therefore would seem to exist in a less degree on Sunday night. If there was ground to except Saturday night, when the workmen, charged as watchmen, examined the premises after the close of business, having an interest in the safety of a building in which they slept, or if there was ground to except Sunday night, after a day in which no work had been done, then it was incorrect to charge the jury that it was the duty of the assured to have a person to keep a good watch in the building during the whole of Saturday and Sunday nights; otherwise they could not recover.

“But suppose the sixteenth question and answer, by their proper construction, could be held to be a representation that the plaintiffs had been accustomed to keep, and would in future keep, a watch on the premises every night during the week, including Sunday and Saturday, still the stipulation that this was a just and true exposition is not absolute, but only *sub modo*; the contract is, that is, so far as they are known to the assured, and are material to the risk. The question therefore is, not only whether the assured was substantially to comply with his stipulation that the representation is true and just, but whether such compliance was material to the risk. This is a question of fact, to be decided by the evidence.

“The insurer may prescribe any conditions to his undertaking that he pleases, and if he makes insurance on condition that a constant watch shall be kept on the premises, otherwise the policy shall cease and be void, then if the assured fails to comply with the conditions, his policy is to cease, and no question can be made whether compliance affected the risk in any way. But when such condition is qualified by the limitation that it is a failure dependent on the question whether it is material to the risk, it opens that question in each particular case.”

§ 251. **Limitation of Risk — Care of Premises — Watchman.** — Several other cases upon the meaning of a warranty to keep a watchman nights have been before the courts. In Connecticut it has been held that an answer to the question, “Is there a watchman in the mill during the night,” that “There is a watchman nights,” carries with it an obligation to keep a watch-

man in the mill every night in the week. So that if it is left without a watchman on Sunday morning, it is a breach of the contract which avoids the policy.¹ And substantially the same doctrine has been laid down in New York, where it has been held that a statement in answer to a specific question, that there is a watchman nights, though followed by a statement that the mill is left alone after the watchman goes off duty in the morning, at meal times, and on the Sabbath, and other days when the mill does not run, requires that there should be a watchman on the premises as late after shutting down on Saturday night as three or four o'clock the next morning, and that loss by fire occurring at that hour in the morning, in the absence of a watchman, is not covered by the policy.² But where the mill was said to be constantly worked, and in answer to a question whether a watch was kept, it was said that there was "none, except people working in the mill during the night," it was held that this did not amount to a stipulation that the mill should be run every night, or on the Sabbath.³

§ 252. **Limitation of Risk — Watchman — Excuse for Absence.** — In *First National Bank of Ballston v. Insurance Company of North America*, it appeared that the following interrogatory was propounded to the insured: "Watchman, — Is one kept in the mill or on the premises during the night, and at all times when the mill is not in operation, or when the workmen are not present." Answer: "Yes." And this was held to be a warranty; and that the fact that the day before the fire the sheriff levied execution on the personal property in the mill, excluding and locking the doors against the employés, was no excuse for a breach; nor could the deputy sheriff in custody, or a trustee of the insured, both of whom were together in the office of the mill, some two rods from it, but who did not in fact keep watch, be considered a watch within the meaning of the policy.⁴

¹ *Sheldon v. Hartford Fire Ins. Co.*, 22 Conn. 235; *Glendale Manuf. Co. v. Prot. Ins. Co.*, 21 Conn. 19.

² *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, reversing s. c. 29 Barb. (N. Y.) 550.

³ *Preiger v. Exchange Ins. Co.*, 6 Wis. 89.

⁴ N. Y. Ct. of App. Jan. 1873.

§ 253. **Limitation of Risk — Working of Mills.** — An answer to the question, “During what hours is the factory worked?” stating that it is “usually” worked certain hours in the summer, and certain other hours in the winter, and adding, “Short time now,” is, it seems, no warranty that the mill shall not run at other hours.¹ “Constantly worked” means worked during the usual and customary working hours and days in the particular business with reference to which the language is used.² In *Mayall v. Mitford*,³ it was said that where certain mills were warranted to be worked by steam, and by day only, it was not enough to invalidate the policy to show that the engine was kept running by night, but it must also appear that the mills were kept going. The words “worked by day only” refer to the mills, and it is no breach of the warranty that the engine is kept going all the time.

§ 254. **Limitation of Risk — Examination after Work.** — In *Houghton v. Manufacturers' Mutual Fire Insurance Company*,⁴ the court elaborately discussed the meaning and effect of a statement that the premises insured were examined after work, both as to what constitutes an examination and when it should take place, that is, what point of time is designated by the words “after work.” The opinion was by Shaw, C. J., and on this point was as follows: —

“One other point was taken, respecting which an opinion was asked for and given at the trial. It related to the representation and the practice in respect to the examination of the factory. The representation was contained in the answer to the fourteenth question, as follows: ‘Is a watch kept constantly in the building? If no watch is constantly kept, state what is the arrangement respecting it. *Answer*: No watch is kept in or about the building; but the mill is examined thirty minutes *after work*. This question referred to the requirements of the office on the last of the representations, amongst which is this, viz., that an examination will be had, say thirty minutes after work.

¹ *North Berwick Co. v. N. E. Fire and Mar. Ins. Co.*, 52 Me. 336.

² *Preiger v. Exchange Mut. Ins. Co.*, 6 Wis. 89.

³ 6 Adolph. & El. 670.

⁴ 8 Met. (Mass.) 114.

“Question 21 was this: ‘During what hours is the factory worked?’ The answer was: ‘From 5 o’clock A.M. to 8½ o’clock P.M. Sometimes extra work will be done in the night.’ Two questions were made at the trial. First, whether the representation of the usual practice amounted to a condition or stipulation that it should be continued. It was ruled at the trial, and the whole court are now of opinion, that as this examination was manifestly intended as a substitute for a constant watch; as it was one which the assured had it in their own power to make or cause to be made; as it was one of the precautions tending to secure the property against danger of fire and tending to its safety,—it was one which, as a general practice, the assured were bound to follow, although an occasional omission, owing to accident, or to the negligence of subordinate persons, servants, or workmen, not sanctioned nor permitted by the assured, or by their superintendent, manager, or agent, might not be a breach or non-compliance.

“The second question under this clause regarded the time at which the examination was to be made. The question, as understood at the trial, was this: Whether, if the factory work was continued during extra hours in the night, that is, after half-past eight P.M., the examination should be made at half an hour after the cessation of actual work, or half an hour after the time fixed in the twenty-first answer, as the usual hour of the cessation of work? On this question, considering the purpose of the examination, and considering that the object of the examiner would be, by the sense of sight or smell, to detect any latent fire, or fire beginning to kindle, arising from sparks from the extinguished lamps, spontaneous combustion, friction of machinery, or otherwise; as this could be best accomplished after the mills were stopped, and the operations of the factory for the night had ceased, and the persons employed in it had left, I was of opinion that the examination must be made at thirty minutes after the cessation of the actual work of the factory, and that an examination at thirty minutes after the time fixed by the twenty-first answer, as the usual time for closing work, if the factory did continue in operation, was not a substantial compliance with this stipula-

tion. And the court are of opinion that this direction, in the case supposed, was right, and that such is the correct construction of the contract. The answer had represented that the usual hour of the cessation of work was half-past eight, yet, having represented that the factory would sometimes be worked during extra hours in the night, they had a right so to work without impairing the contract. But if they thought fit, for any cause, to change the hour of work, so that it should continue to a later hour of the night, they must see that the examination be made at thirty minutes after the actual cessation of work.

“ But another question is now presented, which was not distinctly raised at the trial, and in regard to which the evidence was not fully reported ; and it is this : What is the cessation or termination of work ? or, in other words, What is the meaning of thirty minutes after work, within the meaning of the answer to the fourteenth question ? As there is to be a new trial on other grounds, we think it proper to state the opinion of the court upon this point ; although, through misapprehension of the counsel, or of the court, or otherwise, it was not raised at the trial, or presented on the report.

“ The question as to what is a termination of work, within the meaning of this contract, is partly a question of law and partly a question of fact. The intentions of the parties, if they can be ascertained, are to govern ; and these are to be learned from the language used construed in connection with every part and clause in the contract, the subject-matter respecting which they are used, and the obvious purposes of each stipulation.

“ That the assured were bound to make an examination at thirty minutes after work is the construction of law on the contract. What is the cessation of work is a question of fact for the jury, depending upon the circumstances, and having in view the object and purpose of the stipulation, which was to have an examination at such time as will conduce to the safety of the building. As some of the sources of danger are the continuance of fires and lights, and the friction of machinery, so long as the general work of the factory and operation of the

machinery continues, a jury must find that the work had not then ceased, and could not be warranted in finding otherwise. If, on the contrary, the gates were shut, the machinery all stopped, the fires and lights extinguished, and the operatives generally retired, it could hardly be said that the work had not ceased, although one or two persons should remain to do something which should create no danger of fire. The fact to be looked to is not that the persons employed have all left, or that the lights are all extinguished, or that the machinery has wholly stopped, but the termination of the time during which the factory is worked ; and this is an inference of fact, which may be influenced more or less by all these considerations.

“ Now between the full operation of the factory and the entire cessation of work, extremes may be supposed on either hand, respecting which there could be no doubt. There may be various intermediate stages in which it would be the duty of the jury to determine, upon the particular combination of circumstances, whether they constituted a cessation of working of the factory or not. If the general work of the factory has ceased, although a single machine may remain in operation for a special purpose, we think a jury should be instructed, that if such machine should cause no danger of fire, the examination should be made at thirty minutes after the cessation of the general work, and not after the stopping of the particular machine ; and this the rather because the contract stipulates but for one examination after the cessation of the general work, being apparently most for the interest of both parties, may be presumed to be most conformable to their intentions. And so in the various cases it will be for the jury to say, under the direction of the court, taking into view the purpose of the examination, and the nature of the work done, and the risk attending it, whether, within the meaning of this contract, the work of the factory, in the particular case, had terminated.”

§ 255. **Limitation of Risk — Warming — Care of Stoves — Ashes — Shutters.** — In *Aurora Fire Insurance Company v. Eddy*,¹ one of the questions in the application was, “ How warmed, — are any stoves used ? ” to which the answer

¹ 55 Ill. 213.

was, "No stoves used;" and it was held that this was a representation that stoves were not used at the time when the representation was made, and not a warranty that they should not be used at all. And a warranty that stoves and pipes are well secured, and shall be kept so, is not to be so strictly construed as to be considered violated by an accidental occurrence, as by the fact that the wife of the insured, a few days after the pipe had been partly removed in preparation for removing both stove and pipe during summer, as was usual, in a moment of forgetfulness carelessly kindled a fire in the stove.¹ And a warranty that ashes are kept in brick is complied with if they are kept in some other equally safe way.² But a statement in the description of the building insured that it has "iron doors and shutters," is no warranty that they shall be kept closed at any particular time.³

§ 256. **Description — Representation.** — Matter of description, unless by the terms of the policy made to have greater force, stands upon the footing of representations, and if facts material to the risk are omitted it is a concealment.⁴ And mere matter of immaterial description, so immaterial as not presumably to have been regarded by either party as of importance, contained in the application, will not by reference be converted into a warranty. This was the doctrine declared in a case where a detailed description was given as to the occupancy of the several rooms of a building on which insurance was obtained, which was not in all respects true, even at the time when the insurance was effected.⁵ And to the same effect is *Frisbie v. Fayette Mutual Insurance Company*,⁶ where amongst other statements in the application which was made part of the policy, it was said that a clerk slept in the store. But this was held to be mere description of the mode of occu-

¹ *Mickey v. Burlington Ins. Co.* (Sup. Ct. Iowa), 2 L. J. 15.

² *Underhill v. Agawam Mut. Ins. Co.*, 6 Cush. (Mass.) 440.

³ *Scott v. Quebec Ins. Co.*, 1 Stuart, Lower Canada, 147.

⁴ *Carey v. Goldsmid*, 4 Lower Canada (Q. B.), 107, reversing s. c. 2 ib. 200; *Perry Ins. Co. v. Stewart*, 19 Penn. St. 45; *Baxendale v. Harvey*, 4 H. & N. (Exch.) 445.

⁵ *Boardman v. N. H. Mut. Fire Ins. Co.*, 20 N. H. 551.

⁶ 27 Penn. St. 325.

pancy at the time, and not a warranty that the clerk should sleep there every night.

A call for a true description of the house, building, or place where the insured goods are kept, refers to the characteristics of the house, not the interest of the insured in it.¹ And when the particular interest is the subject-matter of the insurance, a misdescription of the ownership or of the property to which the interest attaches, in the absence of express stipulation to that effect, will not avoid the policy.²

§ 257. Description — Warranty. — But it has been held in some cases that mere matter of description may amount to a warranty. Thus it is said in *Fowler v. Ætna Fire Insurance Company*³ that mere description of the subject-matter of insurance, as, for instance, that a house is “filled in with brick,” is a warranty, after the analogy of marine insurance, as the estimate of the risk must generally depend upon the description. But the case cited in support of the opinion⁴ does not support it. The question in that case was one of the materiality of an alteration of the building insured. And the same was said in *Sillem v. Thornton*,⁵ where the house was described as a two-story house, when in fact it was at the time of insurance being converted into a three-story house, — a change which was commenced some months after the application was made.⁶ And this case states the doctrine with the limitation that only such descriptive matter as relates to the risk amounts to a warranty. Probably that is all that was intended in either case, as that was all that was required by the facts. In *Sillem v. Thornton*, the case was one where the policy was not issued till some months after the application was made, and there had been a change in the mean time in the status of the prop-

¹ *Friedlander v. London Ass. Co.*, 1 M. & Rob. 171.

² *Fox v. Phoenix Fire Ins. Co.*, 52 Me. 333; *Longhurst v. Conway Fire Ins. Co.*, U. S. Dist. Ct. Iowa, 1861.

³ 6 Cowen (N. Y.), 673; s. c. 7 Wend. (N. Y.) 270.

⁴ *Stetson v. Mass. Mut. Fire Ins. Co.*, 4 Mass. 337.

⁵ 3 E. & B. 868.

⁶ See also, to the same effect, *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 533, where, however, the point decided was that there had been no change from a permitted to a prohibited use.

erty,—a two-story house having been converted into a three-story house. As it is a case which goes to the extreme limits of strictness in holding matter of description a warranty, and is an able statement of the reasons therefor, we give here liberal extracts from the opinion by Lord Campbell, C. J.:¹—

“But we are further of opinion that the description in the policy amounts to a warranty that the assured would not, during the time specified in the policy, voluntarily do any thing to make the condition of the building vary from this description, so as thereby to increase the risk or liability of the underwriter. In this case, the description is evidently the basis of the contract, and is furnished to the underwriter to enable him to determine whether he will agree to take the risk at all, and if he does take it, what premium shall he demand. The assured, no doubt, wished him to understand that not only such was the condition of the premises when the policy was to be effected, but, as far as depended upon them, it should not be altered so as to increase the risk during the year for which he was to be liable if a loss should accrue. Without such an assurance and belief the statement introduced into the policy of the existing condition of the premises would be a mere delusion. Identity might continue, and yet the quality, condition, and incidents of the subject-matter insured might be so changed as to increase tenfold the chances of loss, which, upon a just calculation, might reasonably be expected to fall upon the underwriter. Can it be successfully contended that, having done so, the assured retain a right to the indemnity for which they had stipulated upon a totally different basis.

“With respect to marine policies, we conceive that if there be a warranty of neutrality, or of any other matter which continues of importance till the risk determines whether the policy be for a voyage or for a time certain, such a warranty is continuous; and if it be broken by a default of the assured, the underwriter is discharged. The implied warranty of seaworthiness applies only to the commencement of the voyage; but even here, if the assured, during the voyage, were volun-

¹ In *Stokes v. Cox*, 1 H. & N. (Exch.) 531, the court seemed to regard the case as one not to be followed except upon identical facts.

tarily to do any act whereby the ship was rendered unseaworthy, and thereby a loss were to accrue, we conceive that they would have no remedy on the policy. A distinction, however, is taken in this respect between a marine policy and insurances of houses against fire. It would probably be allowed that if during war there was a policy on a merchant ship described as carrying ten guns, and employed in the coal-trade, and after the policy was effected the owner should reduce her armament to five guns, or load her with oil of vitriol, the underwriter would not be liable for a subsequent loss.

“But it is strenuously asserted that if there be an insurance against fire upon a house, which is described in the policy as being of a particular specified description, and in which it is stated that the occupier carries on a certain specified trade,—this being true at the date of the policy, the assured, preserving the identity of the house, may alter its construction, so as to render it more exposed to fire, and may carry on in it a different and more dangerous trade, without prejudice to the right to recover for a subsequent loss by fire, the warranty extending only to the state and use of the premises at the moment when the policy was signed. This seems quite contrary to the principles on which contracts are regulated. The construction and use of the premises insured, as described in the policy, constitute the basis of insurance, and determine the amount of the premium. But this calculation can only be made upon the supposition that the description in the policy shall remain substantially true while the risk is running, and that no alteration shall subsequently be made by the assured to enhance the liability of the insurer. It seems strange, then, that if a house be described in the policy as occupied by the owner, carrying on the trade of a butcher, so that the premium is on the lowest scale, he may immediately afterwards, merely taking care that the walls and floors and roof remain, so that it is still the same identical house, convert it into a manufactory for fireworks, a trade trebly hazardous, for which the highest scale of premium would be no more than a reasonable consideration for the stipulated indemnity.

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“Now, assuming the law to be that upon an insurance against fire there is an implied engagement that the assured will not afterwards alter the premises so that they shall not agree with the description of them in the policy, and so that thereby the risk and liability of the insurer shall be increased, we have only to consider whether, in this instance, the assured have not done so by converting the house insured from “a house composed of two stories” into a house composed of three stories; and this really admits of no reasonable doubt. Mr. Bramwell very candidly admitted that if the policy remained in force after the alteration, it covered the third story as well as the other two. This being so, the increase of the area of the building by a third story must be considered by the court to have necessarily increased the hazard or probability of fire about as much as if the addition to the house had been lateral instead of vertical.

“But there is another consideration, which is quite decisive to show that by the alteration the liability of the insurer is increased, and that his premium, if previously fair, has now become inadequate. Upon an insurance of a house against fire, the insurer must make good the whole of any partial loss, the owner not being considered to stand his own insurer for the excess of the value of the house beyond the sum for which the insurance is effected. The value of the additional property, here sought to be covered by the insurance, must be taken to be £1,000, and for the whole of this, or any part of it, the defendant is now liable to the full amount of the sum for which he has subscribed the policy till he has paid £1,600, *plus* his liability to this amount for the destruction of any part of the original house, valued at £4,000. We are of opinion that this additional liability could not be thrown upon him, without any consideration and against his consent, by the act of the assured in altering the house so as to make it no longer correspond with the description of the house in the policy. If the liability cannot be carried to this extent, it is entirely gone; and, therefore, we pronounce judgment for the defendant.”

§ 258. Limitation of Risk — Description — Surroundings — Dis-

tance. — With regard to the situation of the property insured, its surroundings, its relation to other buildings, and its exposure to risk from external sources, if the insured warrant that he has made a full and true statement, on penalty of forfeiture, he must take the consequences of any real omission. If he will undertake to state all the buildings exposed within a given distance, the penalty of failure will be the loss of his right to recover.¹ We say *real* omission, because if the omission be of some insignificant out-house, it will be of no importance.² It is a question of the substantial truth of the warranty. The more guarded warranty, qualified by the limitation, “so far as is known to the assured,” will throw upon the insurers the burden of proving the knowledge of the insured, without which proof their responsibility cannot be avoided.³ So where the question calls for the relative situation of other buildings and the distance of the building insured from each other building within a given distance.⁴ And the same is true whether the answer be in detail, or generally, as by saying “see diagram,” or “see plan,” the diagram or plan being annexed to the application, which was made part of the policy by its terms.⁵ If the diagram, however, be not annexed to the application, although referred to therein, it will not necessarily be regarded as a warranty, certainly not except as to such matters contained therein as are responsive to the particular interrogatories in the application.⁶ And it may be said generally with regard to such statements as are imported into the contract by reference, and thus made warranties, and it is to be observed that, while the courts will not readily yield to the claim that a merely literal and technical breach will avoid

¹ Chaffee v. Cattaraugus County Mut. Fire Ins. Co., 18 N. Y. 376.

² White v. Mut. Fire Ass. Co., 8 Gray (Mass.), 567.

³ Hall v. People's Mut. Ins. Co., 6 Gray (Mass.), 185.

⁴ Frost v. Saratoga County Mut. Fire Ins. Co., 5 Denio (N. Y.), 154; Susquehanna Ins. Co. v. Perrine, 7 Watts & Serg. (Penn.) 348; Jennings v. Chenango County Mut. Ins. Co., 2 Denio (N. Y.), 75; Burrett v. Saratoga County Mut. Ins. Co., 5 Hill (N. Y.), 188; Trench v. Chenango County Mut. Ins. Co., 7 Hill (N. Y.), 122; Hardy v. Union Mut. Fire Ins. Co., 4 Allen (Mass.), 217.

⁵ Tebbetts v. Hamilton Mut. Ins. Co., 1 Allen (Mass.), 305; Abbott v. Shawmut Mut. Fire Ins. Co., 3 Allen (Mass.), 213.

⁶ Sayles v. North Western Ins. Co., 2 Curtis (U. S. C. Ct.), 610.

the policy, they will be disposed to hold that a technical compliance will be sufficient to prevent a forfeiture. Thus, where in answer to the question as to the relative situation of other buildings, it was said that there were two within fifty feet, this was held to be a literally truthful answer, and sufficient to prevent a forfeiture, although in point of fact one of the buildings was within two feet of the insured premises.¹

§ 259. **Surroundings — How bounded — Situation.** — But a slight variation in the language of the application may make a very material difference. Thus where the question, instead of calling for the relative distance from other buildings and distance from each, is, “How bounded? and the distance from other buildings if less than ten rods?” it has been held that a statement of the nearest contiguous buildings, without stating all within ten rods, was all that was required. To say the least, such a form of inquiry left it fairly open to the insured to infer that all he was called upon to mention was such buildings as were contiguous to, and bounded, the insured premises.² The less specific inquiry, as to “the relative situation of other buildings,” without any limitation as to distance, leaves the matter open to the judgment of the assured; and it would seem to be all that can reasonably be required that he, having regard to the object of the inquiry and to the circumstances of the case, should, in good faith, designate such buildings as he believes, or has reason to believe, will fairly answer this question.³ Upon this point a very interesting case was early tried before Shepley, C. J., in Maine, where the policy was to be void “if any circumstances material to the risk be suppressed,” and where to the questions, “What are the buildings occupied for that stand within four rods? how many buildings are there to the fires of which this may be in any case exposed?” there was no answer; and to the further question, “What distances from other buildings?” the answer was, “East side of the

¹ *Allen v. Charlestown Mut. Ins. Co.*, 5 Gray (Mass.), 384. See also *Sayles v. North Western Ins. Co.*, 2 Curtis (U. S. C. Ct.), 610.

² *Gates v. Madison County Mut. Ins. Co.*, 2 Comst. (N. Y.) 43; s. c. 1 Seld. (N. Y.) 469, reversing s. c. 3 Barb. (N. Y.) 73; *Masters v. Madison County Mut. Ins. Co.*, 11 Barb. (N. Y.) 624.

³ *Hall v. People's Mut. Ins. Co.*, 6 Gray (Mass.), 185.

block small one-story sheds, and would not endanger the building if they should burn." The fact was that the fire broke out in a building across the street, within less than fifty feet of the insured premises, extended to the sheds, through which it was communicated to the property of the insured. It was claimed that there was concealment in not stating the existence of the building in which the fire originated, and misrepresentation in stating that the sheds were such that if burned they would not be a source of danger. But the court ruled that if the answers were in good faith, and according to the best judgment of the insured, if the opinion which he gave (and the questions were such as to involve, in the answer, to a considerable extent matter of opinion) was honestly entertained, however erroneous it might be viewed in the light of subsequent events, he was entitled to recover. The plaintiff had a verdict, and, upon exceptions, the ruling was sustained.¹

§ 260. **Description of Person.**—A statement of relationship in the description of the person whose life is insured is usually a matter of warranty, as where the applicant states that the person for whose benefit the insurance is made is his wife. If it be not expressly made a warranty, there can be no doubt of its materiality. The interest of a mistress in the preservation of the life might be much less than that of a wife. Whether therefore such a statement be a warranty or a misrepresentation it would be fatal to the policy.²

§ 261. **Description.**—In the description of buildings on which insurance is sought care should be taken to give not only a description of the main building, but also of the subordinate structures attached, such as kitchens, sheds, store-houses, and the like, as these latter, save in exceptional cases, are part and parcel of the structure, and are therefore material.³ Yet if the insurers have such a description of the premises as, though leaving the matter open and doubtful, puts them on

¹ We have given the opinion in another connection. *Dennison v. Thomaston Mut. Ins. Co.*, 20 Me. 125; *ante*, § 211.

² *Steward v. Am. Pop. Life Ass. Co.*, Superior Ct. city of Buffalo, cited by Bliss, Ins. 164.

³ *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52; *Day v. Conway Ins. Co.*, 52 Me. 60.

inquiry, and they do not choose to make further inquiry, but accept the application as it is, and issue a policy thereon, they cannot afterwards set up misrepresentation in defence, although the description was inaccurate.¹ So if the answer be imperfect upon its face, and does not convey, or pretend to convey, the information required by the question, the company issuing a policy upon such obviously imperfect answer will not be allowed to set up the imperfection in defence.²

§ 262. **Description — Evidence.** — A technically untrue description may be shown to be true by proof of a usage, as by showing that a house filled in with brick in front and rear, and supported by brick buildings on the sides, is regarded among insurers as a house “filled in with brick.”³ And so a builder may be permitted to testify that buildings, built, the first two stories of brick, and above that by being filled in with brick, would be regarded as “brick buildings.”⁴ Indeed, a false description is in many policies only made a ground of defence when it has the effect to obtain insurance at a lower rate than if a true description had been given. And this would seem to be a sensible as well as practical standard; for if the insurers would have taken the risk at the same rate had they known the truth, they ought not to complain.⁵

§ 263. **Description — Estoppel.** — But knowledge of the company or its agents of the untruthfulness of the statements as to the distance of neighboring buildings, at the time when the insurance is effected, by the general concurrence of the more recent decisions, will estop the insurers from setting up such untruthness in defence.⁶

¹ *Woods v. Atlantic Mut. Ins. Co.*, Superior Ct. Mo., 12 Am. Law Reg. (N. S.) 47.

² *Peoria Mar. and Fire Ins. Co. v. Perkins*, 16 Mich. 381.

³ *Fowler v. Aetna Fire Ins. Co.*, 7 Wend. (N. Y.) 270.

⁴ *Mead v. North Western Ins. Co.*, 3 Seld. (N. Y.) 530.

⁵ *Columbian Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 25; *Dobson v. Sotheby*, 1 Moo. & Mal. 90; *Moliere v. Penn. Fire Ins. Co.*, 5 Rawle (Penn.), 342.

⁶ *Ante*, § 143; *Clark v. Union Mut. Fire Ins. Co.*, 40 N. H. 333; *Longhurst v. Conway Fire Ins. Co.*, U. S. Dist. Ct. Iowa, 1861; *Plumb v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 399.

CHAPTER X.

OF SPECIAL PROVISIONS OF THE CONTRACT (*continued*).

§ 264. **Limitation of Risk — Alienation.** — It follows from the general principle that the insured cannot recover save in exceptional cases for a loss, unless it appear that he had an interest in the subject-matter of insurance, as well at time of the loss as at the time when the insurance was effected, that if he parts with his interest subsequent to the insurance, and at the time of the loss has no longer an insurable interest, he will have no claim upon the company. This parting with his interest is termed in the law of insurance an *alienation*. The term is derived from the law of real property, and is there defined to be “any method of acquiring title wherein estates are voluntarily resigned by one man and accepted by another, whether that be effected by sale, gift, marriage settlement, devise, or other transmission of property by the mutual consent of the parties.” It is title by purchase in contradistinction to title by descent.¹ And this alienation, if absolute, works a forfeiture whether so stipulated in the policy or not, if the property remains out of the insured at the time of the loss.² So does a donation *inter vivos*, without restriction, except that the donor shall not alienate, or dispose of, except by will.³ And an absolute deed, whether warranty or quitclaim with a mortgage back, is an alienation.⁴ And so is a transfer to the assignee, by decree of the court, of a bankrupt’s estate, under the bankrupt laws of the United States, upon the bankrupt’s petition. He is thereby divested of all his property, and it becomes vested in the assignee.

¹ Blackstone, Comm. 2, 287.

² *Wilson v. Hill*, 3 Met. (Mass.) 66; *Ætna Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385.

³ *McCarty v. Com. Ins. Co.*, 17 La. 365.

⁴ *Ibid.*; *Home Mut. Fire Ins. Co. v. Hauslein*, Sup. Ct. Ill., 1 Ins. L. J. 818; *Abbott v. Hampden Ins. Co.*, 30 Me. 414. See also *post*, § 269.

That the proceedings may be stayed, and thus the property become revested in him, is a contingency too remote to be considered the foundation of a remaining insurable interest in the bankrupt. He has no power to reclaim the property, and has no right to it in law or equity by any contract executed or executory. One may be interested in the avails of property alienated, and yet have no right to the property itself.¹ And of course a voluntary assignment for the benefit of creditors is equally a transfer,² unless possession be retained by the assignor.³ Even an assignment, fraudulent and void as against creditors, by virtue of the insolvent laws, has been held an alienation. As the case stood before the court the assignment was as if it were valid, since the court held the assignor estopped from setting up his own fraud for the purpose of getting back to his original title.⁴ And so, perhaps, is a sale by a master in chancery of a mortgagor's interest under a decree of foreclosure, with part payment of the purchase-money and execution by the vendee of the articles of sale, although the decree is not enrolled, and no deed is delivered. The deed, when delivered, relates to the time of the sale.⁵ We say "perhaps," because the rule is admitted to be different in England, and the decision seems to rest upon the practice in New York. The weight of authority undoubtedly is, that the "transfer and change of title," to use the language of the policy in this case, does not take place till the deed is delivered.

§ 265. **Temporary Alienation.** — If, however, the alienation be temporary, and the property be restored before the loss happens to the insured, the policy will reattach to the property, or to so much thereof as is restored, and protect it. Such temporary alienation has only the effect to suspend the operation of the policy so long as the interest in the subject-

¹ *Young v. Eagle Fire Ins. Co.*, 14 Gray (Mass.), 150; *Adams v. Rockingham Mut. Fire Ins. Co.*, 29 Me. (16 Shep.) 292.

² *Dey v. Poughkeepsie Mut. Ins. Co.*, 23 Barb. (N. Y.) 623; *Hazard v. Franklin Mut. Fire Ins. Co.*, 7 R. I. 429.

³ *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9.

⁴ *Dadmun Manufacturing Co. v. Worcester Mut. Fire Ins. Co.*, 11 Met. (Mass.) 429.

⁵ *McLaren v. Hartford Fire Ins. Co.*, 1 Seld. (N. Y.) 151.

matter of insurance is out of the insured, whether there be a special provision prohibiting alienation or not.¹ This subject was recently very elaborately considered in the Supreme Court of Massachusetts, and the same conclusion arrived at as above stated.² And, in general, a change of title which does not put an end to the insurable interest is not an alienation.³

§ 266. **Title by Descent no Alienation.**—A transfer of title by descent is, therefore, according to the definition given,⁴ no alienation. By the death of the ancestor the property descends to the heir, it is true; but his title is not by what is technically understood to be a conveyance, purchase, or alienation.⁵

§ 267. **If Title not conveyed, no Alienation—Executory Agreement.**—In discussing its meaning as bearing upon the subject of insurance, it has been said to import a conveyance of the title, and that nothing short of this would amount to an alienation.⁶ “Transfer of the title in the property insured,” means the title and ownership of the property insured, and not the interest of the insured therein.⁷ And whether applied to real or personal estate, it is a disposition by the owner of the property, by which he parts with all his interest, and it passes to another. An agreement, therefore, to sell, though in writing and with delivery of possession, and a receipt of part of the purchase-money in payment, is no alienation, so long as the title has not passed, and the property remains at the risk of the vendor.⁸

¹ *Lane v. Maine Mut. Fire Ins. Co.*, 3 Fairfield (Me.), 44; *Power v. Ocean Ins. Co.*, 19 La. 28.

² *Worthington v. Bearse*, 12 Allen (Mass.), 382, cited *ante*, § 101. And see also *Hooper v. Hudson River Ins. Co.*, 17 N. Y. 424, affirming s. c. 15 Barb. (N. Y.) 413; *West Branch Ins. Co. v. Helfenstein*, 40 Penn. St. 289.

³ *Hitchcock v. North Western Ins. Co.*, 26 N. Y. 68.

⁴ *Ante*, § 264.

⁵ *Burbank v. Rockingham Mut. Fire Ins. Co.*, 4 Fost. (N. H.) 550.

⁶ *Masters v. Madison County Mut. Ins. Co.*, 11 Barb. (N. Y. S. C.) 624.

⁷ *Brown v. Springfield Fire and Mar. Ins. Co.*, 1 Ins. L. J. 57.

⁸ *Boston and Salem Ice Co. v. Royal Ins. Co.*, 12 Allen (Mass.), 381; *Davis v. Quincy Mut. Fire Ins. Co.*, 10 Allen (Mass.), 113; *Masters v. Madison County Mut. Ins. Co.*, 11 Barb. (N. Y.) 624; *Norcross v. Franklin Ins. Co.*, 17 Penn. St. (5 Harris) 429; *Trumbull v. Portage Mut. Fire Ins. Co.*, 12 Ohio, 305; *Hill v.*

§ 268. **Alienation — Personal Property — Delivery.** — In cases of personal property, as the title passes by delivery, unless there is an agreement to the contrary, it is probable that an unconditional delivery would be held to amount to an alienation, and not otherwise.¹ *Worthington v. Bearse*² — a case of marine insurance — shows that an agreement for a transfer, so long as it is not completely executed, and so long as a scintilla of interest remains in the insured, will not be treated as an alienation.

The facts of the case were as follows: The action was on a policy of insurance for two thousand dollars, payable to the plaintiff in case of loss, issued by the defendants to David P. Nickerson, upon seven-eighths of the schooner *William B. Castle*, for one year from April 8, 1860.

Nickerson had mortgaged his interest in the schooner to the plaintiff; and afterwards, on the 11th of October, 1860, conveyed thirteen-sixteenths of the schooner to George T. Lovell, receiving notes of Lovell, Atwood, & Co. in payment, and Nickerson was to pay to the plaintiff what was then due to him, namely, about four thousand dollars. About the 20th of the same month, Lovell reconveyed said interest to Nickerson, and took back the notes which had been given in payment therefor, none of them having become due. This interest was reconveyed to Nickerson, because he could not carry out his contract to obtain a release from the plaintiff, as the latter would not accept said notes in payment thereof; and on the part of Lovell, because a person who was to be her master was dissatisfied with her; so that the parties acted from different motives, and each party was ignorant of the motives of the other. Upon both of these transfers, the papers were changed in the custom-house. The schooner was totally lost on or

Cumberland Valley Mut. Prot. Co., 9 P. F. Smith (Penn.), 474; *Gilbert v. North Am. Fire Ins. Co.*, 23 Wend. (N. Y.) 43; *Perry Ins. Co. v. Stewart*, 19 Penn. St. 45; *Shotwell v. Jefferson Ins. Co.*, 5 Bosw. (N. Y. Superior Ct.) 247.

¹ *Ætna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9; *Norcross v. Ins. Co.*, 17 Penn. St. 429; *Boston and Salem Ice Co. v. Royal Ins. Co.*, 12 Allen (Mass.), 381; *Tallman v. Atlantic Ins. Co.*, 40 N. Y. 87.

² 12 Allen (Mass.), 382.

about the 16th of March, 1861. Nickerson then owned seven-eighths of her, subject to the mortgage of Worthington.

Upon these facts, the opinion of the court, delivered by Bigelow, C. J., was as follows:—

“We entertain no doubt that the defendants are liable for the full amount insured by the policy. This liability rests upon two grounds, either of which is sufficient to sustain the plaintiff's claim. In the first place, on the facts stated, the alleged sale by the assured of thirteen-sixteenths of the vessel covered by the policy was incomplete, and never took effect so as to extinguish his insurable interest therein. One of the essential stipulations of the agreement of sale was not complied with. The vendor expressly agreed to pay the amount due on the mortgage of his share of the vessel, and to procure a release from the mortgagee. This, the case finds, he did not and could not do. Until this part of the contract was complied with, the vendee had a right to avoid the sale and rescind the whole bargain. The delivery of the bill of sale passed a title only at the election of the vendee. He might, within a reasonable time after the failure of the assured to fulfil his contract of sale by procuring a release of the mortgage on the vessel, elect to restore the legal title and recover back the consideration of the transfer. During this time the plaintiff had a continuing and subsisting interest in the vessel. The transfer could not be regarded as absolute and complete, but only conditional on a compliance with the terms of the bargain. A mere transfer of the legal title of a vessel does not extinguish a right to recover on a policy, if the party making the transfer still retains any right or interest in the vessel or her proceeds.¹

“The insured clearly had an interest in the preservation of the vessel, until it was certain that the contract for her sale had become complete, and the title to her had vested absolutely in the vendee. In this view of the facts, the insured did not forego his right to recover on the policy pending the transactions in relation to the transfer of the vessel.”²

¹ *Gordon v. Mass. Ins. Co.*, 2 Pick. 249; *Lazarus v. Commonwealth Ins. Co.* 19 Pick. 81; *Wilson v. Hill*, 3 Met. 66, 71.

² The other ground of decision is stated *ante*, § 101.

§ 269. *Mortgage, before Foreclosure, no Alienation or Change of Title — Entry for Foreclosure.* — The charter of a mutual insurance company provided that "when any property insured in the company shall in any way be alienated the policy thereupon shall be void;" and a by-law provided that "when the title of any property insured shall be changed by sale, mortgage, or otherwise, the policy shall thereupon be void;" and it was held that a mere mortgage did not avoid the policy. A mortgage is not an alienation, nor is it, without foreclosure, a change of title. If the company had stipulated that the policy should be void if the property insured should be mortgaged, there would have been no room for doubt. If, however, that was their design, the language by which they had attempted to express it had not been fortunately chosen. They had left it in doubt; and contracts will not be avoided and rendered ineffectual by doubtful phrases.¹ The contrary doctrine has, however, been held in Indiana, though with some hesitation.² And in Michigan³ it has been held that a conveyance absolute in form, but in fact merely as security for a debt, though not a sale, is a transfer or change of title which avoids a policy. "The words," say the court, "*transfer or change of title*, are more comprehensive than the word *sale*, which immediately precedes them. A sale is a parting with one's interest in a thing for a valuable consideration. This is what is generally understood by the word, and in every sale there is a transfer or change of title from the vendor to the vendee. But there may be a transfer or change of title without a sale. Should A. convey a piece of property to B. to hold in secret trust for him, there would be a transfer or change of title from A. to B., but there would not be a sale of the property, or an actual

¹ *Shepherd v. Union Mut. Fire Ins. Co.*, 38 N. H. 232; *Folsom v. Belknap County Mut. Fire Ins. Co.*, 10 Fost. (N. H.) 231; *Howard Ins. Co. v. Bruner*, 23 Penn. St. (11 Harris) 50; *Jackson v. Massachusetts Mut. Fire Ins. Co.*, 23 Pick. (Mass.) 418; *Conover v. Mut. Ins. Co. of Albany*, 3 Denio (N. Y.), 254; s. c. 1 Comst. (N. Y.) 290; *Pollard v. Somerset Mut. Fire Ins. Co.*, 42 Me. 221; *Smith v. Monmouth Mut. Fire Ins. Co.*, 50 Me. 96; *Dutton v. New England Mut. Fire Ins. Co.*, 9 Fost. (N. H.) 153; *Rollins v. Columbian Mut. Fire Ins. Co.*, 5 Fost. (N. H.) 200; *Rice et al. v. Tower & Trs.*, 1 Gray, 426.

² *McCulloch v. Indiana Mut. Fire Ins. Co.*, 8 Blackf. 50; *Indiana Mut. Fire Ins. Co. v. Coquellard*, 2 Carter, 645.

³ *Western Mass. Ins. Co. v. Riker*, 10 Mich. 279.

parting with it to B. for a valuable consideration, although the conveyance on its face would import a sale from A. to B. And if the trust, instead of being secret, appeared on the face of the conveyance, there would still be a change of title. The title would no longer be in A., but in B., his grantee. We think such a conveyance would clearly come within the condition of the policy and put an end to the insurance.”¹

In *McIntire v. Norwich Fire Insurance Company*,² the policy contained among its various conditions a stipulation in these words: “If the title of the property is transferred or changed,” “this policy shall be void; and the entry of a foreclosure of a mortgage . . . shall be deemed an alienation of the property, and this company shall not be holden for loss or damage thereafter.” Upon the meaning of this provision in the policy the court held the following language:—

“What are we to understand by the expression, ‘the entry of a foreclosure of a mortgage,’ which, according to the terms of the contract, ‘shall be deemed an alienation of the property,’ after which the defendants ‘shall not be holden for loss or damage’? It is a somewhat peculiar form of expression, not strictly and technically accurate, perhaps; but to be interpreted in such a manner as to carry out the true intent of the parties, so far as that intent is discoverable. In the case of a mortgage upon real estate, the mortgagee, on breach of condition, may enter for the purpose of foreclosure; and, although his title may become absolute by mere lapse of time, no other entry or formality may be required on his part; and there is nothing in any public record, or in any proceeding, which can literally be said to be an entry of foreclosure.

“In the case also of a mortgage of personal property, the mortgagee gives notice of his intention to foreclose, in the form prescribed by statute, and his title afterwards may become absolute without any further act or ceremony on his part. He cannot be said to enter upon the property, nor can it in a literal sense be said that there is an entry of foreclosure.

“In both cases, the first step towards foreclosure is the manifestation of the intent to foreclose, which is to be indi-

¹ And see *ante*, § 264.

² 102 Mass. 230.

cated in such manner as the law points out, accompanied with a formal registration in the public records. It is very manifest, as we think, that the words 'the entry of a foreclosure,' as used in the policy, are not to be interpreted as meaning exactly the same thing as a consummated and finished foreclosure. The policy provides not merely for the transfer, but the change of title, and the insurer may very naturally have considered an entry for foreclosure as a material change in the title of the assured, and in his relation to the property. The parties, in their contract, have taken pains to avoid saying simply that 'the foreclosure of a mortgage' shall be deemed an alienation. There would be no occasion for them to say that, inasmuch as the law would plainly have said it for them.

"The meaning of the policy, in our judgment, is, that something short of an actual and complete foreclosure shall be considered, for the purposes of their contract, as a transfer or change of title, and that an entry for foreclosure, or an act which of itself, and without any further formality or process on the part of the mortgagee, will deprive the assured of all right and title in the property, unless he pay the debt, shall be deemed sufficient to terminate the risk. The defendant might well be unwilling to continue to insure property which is so situated that its destruction by fire might be the easiest or only way to make it beneficial to the assured."¹

When, however, the title becomes absolute in the mortgagee or his assigns, by foreclosure, or, what is tantamount to a foreclosure, as by merger in the purchaser of the equity, who subsequently takes an assignment of the mortgage, the transfer is complete and the change of title is an alienation;² unless the insurance is by the mortgagor, for the benefit of the mortgagee, who signs the premium note and pays assessments, in which case, as the title and property remains in the hands of the person liable to the company, foreclosure is no aliena-

¹ 102 Mass. 231.

² *Macomber v. Cambridge Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 133; *McLaren v. Hartford Fire Ins. Co.*, 1 Seld. (N. Y.) 151; *Mt. Vernon Manufacturing Co. v. Summit County Mut. Fire Ins. Co.*, 10 Ohio St. 347.

tion.¹ And the foreclosure must be absolute. If it be incomplete, and there is an outstanding equity of redemption, it is no sale or conveyance.²

§ 270. **Alienation — Chattel Mortgage.**— And a mortgage of personal property would seem to stand upon the same ground,³ certainly while the mortgagor has the possession.⁴ A mortgage is something less than an alienation.⁵ But in *Tallman v. Atlantic Fire and Marine Insurance Company*, it was held that the execution and delivery of a chattel mortgage was a “sale, transfer, or change of title,” though it was not necessary for the court to go so far, as in fact there had been in that case, prior to the loss, a foreclosure, with possession in the mortgagee, and no outstanding equity of redemption. The case was afterwards reversed,⁶ under such a state of facts as brings the case into accord with the other authorities.

§ 271. **Mortgage is an Alteration of Ownership.**— But a mortgage is an “alteration of ownership” within the meaning of a policy which inhibits an alteration of ownership upon penalty of forfeiture.⁷ And so it is a violation of a provision against a sale or alienation “in whole or in part.” And, indeed, any disposition of the subject-matter of insurance, such that any property therein passes to another, amounts to an alienation of the property in part.⁸ And where the insured sells the insured property, receives pay in part, and retains a lien for a portion of the purchase-money, it is a “change of interest” which avoids the policy.⁹

§ 272. **Conditional Sale no Alienation.**— But a conditional sale is no alienation; as where the assured executed a war-

¹ *Bragg v. N. E. Mut. Fire Ins. Co.*, 5 Fost. (N. H.) 289.

² *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40.

³ *Holbrook v. Am. Ins. Co.*, 1 Curtis (U. S. C. Ct.), 193; *Deusen v. Charter Oak Fire and Mar. Ins. Co.*, 1 Robt. (N. Y. Superior Ct.) 55.

⁴ *Rice v. Tower*, 1 Gray (Mass.), 426; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9.

⁵ *Orrell v. Hampden Fire Ins. Co.*, 13 Gray (Mass.), 431.

⁶ 3 Keyes (N. Y.), 87.

⁷ *Edmonds v. Mut. Safety Fire Ins. Co.*, 1 Allen (Mass.), 311.

⁸ *Abbott v. Hampden Mut. Fire Ins. Co.*, 30 Me. 414.

⁹ *Bates v. Com. &c., Ins. Co.*, 2 Cincinnati Superior Ct. Repr. 195.

ranty deed of the premises, and at the same time received back from the grantee a deed of the same premises, with a condition that if he should pay to the assured a specified sum within a limited time, meanwhile, and until that sum should be paid, the assured to retain possession of the premises, and, upon payment, the second deed to be void, but otherwise in force; and it appeared the grantee in the first deed never paid, or agreed to pay the sum mentioned, and it was entirely optional with him whether to do so or not. The two deeds, being executed at the same time, are to be regarded as one contract, and were in effect the same as if the condition had been inserted in the first deed.¹ Nor will a sale, absolute in form, if intended as security for a debt, nor any conveyance which a court of equity will treat as a mortgage, be deemed an alienation, whether there be any agreement in writing to that effect or not.² And a sale, with an agreement for resale, intended as a security, is no "transfer or termination of interest."³ Nor is an assignment as collateral security.⁴ Nor is a conveyance by the insured, with a simultaneous reconveyance to be held in trust for him.⁵ Nor is a lease.⁶ And when the policy stipulates against a "sale, transfer, or change of title," a mere agreement between the owner of personal property insured and another person, to represent to the creditors of the owner, in order to prevent attachment, that it had been sold to such other person, amounts to neither; although, doubtless, something less than an alienation—as, for instance, a mortgage, or a conveyance of a portion of the interest of the insured, or one invalid as against creditors—would be a violation of the stipulation.⁷

¹ *Tittmore v. Vermont Mut. Fire Ins. Co.*, 20 Vt. (5 Washb.) 546.

² *Hodges v. Tenn. Mar. and Fire Ins. Co.*, 4 Seld. (N. Y.) 416.

³ *Holbrook v. Am. Ins. Co.*, 1 Carter (U. S. C. C.), 193.

⁴ *Ayres v. Hartford Ins. Co.*, 21 Iowa, 198; *Same v. Home Ins. Co.*, 21 Iowa, 185.

⁵ *Morrison v. Tenn. Mar. and Fire Ins. Co.*, 18 Mo. (3 Bennett) 262.

⁶ *Lane v. Maine Fire Ins. Co.*, 3 Fairf. (Me.) 44; *West Branch Ins. Co. v. Helfenstein*, 40 Penn. St. 289; *Hobson v. Wellington Dist. Ins. Co.*, 6 Upper Canada (Q. B.), 536.

⁷ *Orrell v. Hampden Fire Ins. Co.*, 13 Gray (Mass.), 431.

§ 273. **Transfer or Change of Title.**—As the object of providing against a transfer or change of title is to guard against a diminution in the strength of the motive which the insured may have to be vigilant in the care of his property, the substantial diminution of interest in the property insured has been suggested as a test of the kind of transfer or change of title which will avoid the policy. Thus, in *Ayres v. Hartford Fire Insurance Company*,¹ the court, in discussing what *transfer or change of title* would avoid the policy, held the following language: “The object of the insurance company by this clause is, that the interest shall not change so that the assured shall have a greater temptation or motive to burn the property, or less interest or watchfulness in guarding and preserving it from destruction by fire. Any change in or transfer of the interest of the insured in the property of a nature calculated to have this effect is in violation of the policy. But if the real ownership remains the same, — if there is no change in the *fact of title*, but only in the evidence of it, and if this latter change is merely nominal, and not of a nature calculated to increase the motive to burn, or diminish the motive to guard the property from loss by fire, the policy is not violated.” And the following very recent case in New York may perhaps be taken as an illustration of the same rule. One Marilla Kirk, as testamentary trustee, held a certain grist-mill for the heirs of one Andrew Kirk, which she caused to be insured to “the heirs and representatives of Andrew Kirk, deceased.” Afterwards, and during the currency of the policy, she, as trustee, conveyed the mill for one thousand dollars, and took a mortgage back for seven thousand dollars. The mill was burned during the year for which it was insured, and before the fire said Marilla Kirk resigned, and the plaintiff was appointed in her place. The policy was to be void if the property were sold or transferred, or any change took place in the title or possession, whether by legal process or judicial decree or voluntary transfer or conveyance; and also when the property was disposed of, so that all interest or liability of the insured ceased, the insurance was also to cease. The plain-

¹ 17 Iowa, 176.

tiff had a verdict and judgment, and on appeal the judgment was affirmed.¹

§ 274. **Alienation — Levy of Execution.** — Nor is a seizure of the goods insured, though taken into the actual possession of the sheriff, an alienation. The general property in goods seized on execution remains in the debtor till they are sold. The right of the sheriff, by virtue of the seizure, is defeasible, it being his duty to release and restore the goods to the defendant in the execution, upon a tender of the amount due.² In the last case cited, Metcalf, J., said: "There are *obiter dicta* in the books, that by a seizure on a *fi. fa.* the debtor's property in the goods is lost; that the sheriff acquires a special property, but that the general property of the debtor is divested and is in abeyance.³ But the law never was so."⁴ The same is true of a seizure of an equity of redemption of real estate; for after a sale of the equity there is still left a right to redeem, — a right which may constitute a valuable interest. So, at least, will the law presume, in the absence of evidence to the contrary.⁵

§ 275. **Change of Title — Increase of Interest.** — It seems hardly necessary to say that any change of title whereby the interest of the insured becomes enhanced, and his incentives to vigilance increased, as would be the case where a title becomes absolute in the mortgagee by foreclosure, or a tenant for years or for life purchases the fee, — in other words, a sale or conveyance to the assured, — though within the words of the proviso against sale or transfer, is not within its spirit and purpose, and will not vitiate the policy.⁶

§ 276. **Alienation by Mortgagor after Assignment of Policy.** —

¹ *Savage v. Howard Ins. Co.*, N. Y. Sup. Ct., 3d Dist., Sept., 1872, Alb. L. J. Mar. 1, 1873.

² *Clark v. New England Mut. Ins. Co.*, 6 Cush. (Mass.) 342; *Campbell v. Hamilton Mut. Ins. Co.*, 51 Me. 69; *Rice et al. v. Tower & Trs.*, 1 Gray (Mass.), 427.

³ Referring to 1 Lev. 282; 1 Vent. 53; 6 Mod. 293; Holt, 647; 4 Mass. 403; 2 Mass. 517.

⁴ *Franklin Fire Ins. Co. v. Findley*, 6 Whart. (Penn.) 483.

⁵ *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 44.

⁶ *Bragg v. New England Mut. Fire Ins. Co.*, 5 Fost. (N. H.) 289; *Heaton v. Manhattan Fire Ins. Co.*, 7 R. I. 502.

Though it be stipulated that the policy shall be void by alienation, this must be held to mean alienation by the party insured. If the original insured, by the consent of the insurers, assigns the policy, and the assignees agree with the insurers to pay all assessments which shall thereafter be made upon the policy, and that the property insured shall remain subject to the same lien as before, the legal effect of the transaction is to create a new, substantive, and distinct contract with the assignees. It is substantially the same as if the policy had been issued to them. An alienation, therefore, by a mortgagor of his equity of redemption, after an assignment of the policy, under the circumstances just stated, is not an alienation by the assured, but rather by a stranger, over whom the assignees have no control, and for whose acts they are not at all responsible, and does not avoid the policy.¹

§ 277. **Alienation — Entire Contract.** — As a general rule, a breach of condition, where the contract is entire, affects all the property insured, though it may be of different kinds and separately appraised in the policy. Thus the alienation of a house vitiates the policy both as to the house and the furniture in it.² So, also, the sale by a partner of his undivided interest avoids a policy containing a prohibition of such sale as to the interests of the other partners.³ Misrepresentation as to the title to a store, or amount of incumbrance thereon, vitiates the insurance both upon the store and the stock of goods therein.⁴ Additional insurance, without notice, on stock vitiates the policy both on the stock and fixtures.⁵ The appro-

¹ *Foster et al. v. Equitable Mut. Fire Ins. Co.*, 2 Gray (Mass.), 416; *Bragg v. New England Mut. Fire Ins. Co.*, 5 Fost. (N. H.) 289; *Boynton v. Clinton and Essex Mut. Ins. Co.*, 16 Barb. (N. Y.) 254. And see also *Fogg v. Middlesex Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 337.

² *Barnes v. Union Mut. Fire Ins. Co.*, 51 Me. 110.

³ *Dix v. Mercantile Ins. Co.*, 22 Ill. 272.

⁴ *Gould v. York County Mut. Fire Ins. Co.*, 47 Me. 403; *Lovejoy v. Augusta Mut. Fire Ins. Co.*, 45 Me. 472; *Friesmouth v. Agawam Mut. Ins. Co.*, 10 Cush. (Mass.) 587; *Brown v. People's Mut. Ins. Co.*, 10 Cush. (Mass.) 280; *Richardson v. Maine Ins. Co.*, 46 Me. 394; *Day v. Charter Oak Fire Ins. Co.*, 51 Me. 91.

⁵ *Kimball v. Howard Fire Ins. Co.*, 8 Gray, 33; *Associated Firemen's Ins. Co. v. Assum*, 5 Md. 165; *Ramsay et al. v. Mut. Fire Ins. Co.*, 11 Upper Canada (Q. B.), 516.

priation of one of two buildings, both included in the policy and insured for distinct amounts, to a more hazardous use, vitiates the policy as well upon the one not so appropriated as upon the other.¹ And an alienation by a mortgagor of part of the premises upon which he had effected insurance, after an assignment of the policy with the consent of the insurers to the mortgagee, who signed the premium note, will avoid the policy *in toto* as to the mortgagor's interest.² If the premium be entire, and likewise the deposit note, and the lien for the assessment on the same attach to all the separate parcels, the contract is entire, and if void at all is void *in toto*, although several sums are designated as insured upon the several parcels. But if the several parcels are insured in several sums, each having its specific premium and deposit note, and for which a distinct lien can be asserted, then an alienation of one parcel is only an avoidance of the policy *pro tanto*.³

§ 278. **Alienation of one of several distinct Parcels of Property.** — But the authorities are not all agreed upon the point that a violation of a condition, or a misrepresentation as to part of the property insured, avoids the policy as to the whole when the contract is entire. In *Lochner v. Home Mutual Fire Insurance Company*,⁴ it was held that a misrepresentation as to the title of the house insured only vitiates the policy as to the house, and that a recovery might be had for the loss of furniture insured in the same policy under a separate valuation. "With respect to the furniture and the piano," say the court, "although they may be regarded as being insured in the building covered by the policy, yet, because the statute arbitrarily avoids the policy as to the building for want of a disclosure of the fact which did not at all affect the risk, we cannot come to the conclusion that the policy was likewise void as to the furniture and piano." And in *Phoenix Insur-*

¹ *Lee v. Howard Fire Ins. Co.*, 3 Gray (Mass.), 583; *Fire Association of Phila. v. Williamson*, 26 Penn. St. 196.

² *Boynton v. Clinton and Essex Mut. Ins. Co.*, 16 Barb. (N. Y.) 254.

³ *Friesmuth v. Agawam Mut. Ins. Co.*, 10 Cush. (Mass.) 587.

⁴ 17 Mo. 247; s. c. affirmed, 19 Mo. 628.

ance Company *v.* Lawrence,¹ where the interest of the insured in a storehouse was untruly stated, it was nevertheless held that the plaintiff might recover for the goods therein insured in the same policy, and upon a distinct and separate valuation, although the premium paid was an entire sum. In the last case, the case of Clarke *v.* New England Mutual Fire Insurance Company was relied upon,² where the court held that, there being separate and distinct insurance upon two buildings, alienation of one would not avoid the policy as to the other.³ And a sale by the insured of one of several distinct parcels of real estate covered by the policy, that part forming a distinct item, with separate and distinct valuation, does not avoid the policy except *pro tanto*: as to the property still held by the insured at the time of the loss, he is entitled to recover according to the terms of the policy.⁴ Nor does the assignment of part of a mortgage debt.⁵ Nor upon principle does it seem to be of any consequence whether the valuation be separate and distinct or not. Surely a merchant who insures his store and stock in trade, or a farmer who insures his barn and contents, may recover for the unsold balance of his stock, notwithstanding he daily sells a portion of it. The diminution of insurable interest coincides with a diminution of the right to claim for loss, and relatively there is no change in the situation. To say that the policy is thereby *pro tanto* avoided, is not so correct an expression as to say that the amount which the insured would have the right to recover under it is *pro tanto* reduced.⁶ Nor will the result be different,

¹ 4 Met. (Ky.) 9.

² 6 Cush. (Mass.) 342.

³ The report does not show whether the premium was an entire sum or not; but on reference to the record it is found that the plaintiff was insured for \$2,500, — \$2,200 on his tavern-house and \$300 on his shop, — for which was paid a cash premium of \$5, and a deposit note of \$371 given. Upon these facts the case is not now law in Massachusetts, though it does not appear to have been overruled or even referred to in the subsequent cases. See the preceding section.

⁴ Clark *v.* New England Mut. Fire Ins. Co., 6 Cush. (Mass.) 342. And see also Bodle et al. *v.* Chenango Mut. Ins. Co., 2 Comst. (N. Y.) 53.

⁵ Rex *v.* Ins. Co., 2 Phila. (Penn.) 357.

⁶ Lane *v.* Maine Mut. Fire Ins. Co., 3 Fairf. (Me.) 44; Hobbs et al. *v.* Memphis Ins. Co., 1 Sneed (Tenn.), 444.

though it be stipulated that the policy is to be void upon a sale of the whole or any part of the property insured. Nothing short of a sale of the whole will deprive the insured of his right to recover at all. If he sells a part, he merely forfeits the right to claim for the loss of that part, and for the simple and obvious reason that, having sold it prior to the fire, he did not, and could not, lose it. But if he keeps up his stock he recovers to the full amount.¹ In some cases the policy provides that the insurance shall be void only as to those parcels with reference to which the breach takes place.²

§ 279. **Alienation by one joint Owner to another.** — Much discussion has been had in the courts upon the question whether a sale by one joint owner to another is an alienation which avoids the policy; but the better opinion seems to be that it is not strictly speaking an alienation, a transfer from one to another, but rather a shifting of interests amongst joint owners, without the introduction of any stranger to the number of the insured. So far as the contract is based upon the personal qualities of the insured, there is no increase of risk, because no element of improvidence or carelessness is introduced, and the property insured will still be under the care and management of the original parties.³ But the rule was held to be otherwise in *Dey v. Poughkeepsie Mutual Insurance Company*,⁴ if by the change in the partnership a new member is introduced.

§ 280. **Change amongst joint Owners.** — On the other hand, there are numerous and respectable authorities not only that a dissolution of the partnership and a division of the property amongst the copartners is a "transfer or change of title,"

¹ *Wolfe v. Security Fire Ins. Co.*, 39 N. Y. 49.

² *Daniel v. Robinson, Batty (Irish)*, 650.

³ *Hobbs v. Memphis Ins. Co.*, 1 Sneed (Tenn.), 444; *Hoffman v. Aetna Fire Ins. Co.*, 1 Robt. (N. Y. Superior Ct.) 501; s. c. affirmed, 32 N. Y. 405; *Pierce v. Nashua Fire Ins. Co.*, 50 N. H. 297; *Burnett v. Eufala Home Ins. Co.*, Sup. Ct. Ala., 1872; *Buffalo Steam-Engine Works v. Sun Mut. Ins. Co.*, 17 N. Y. 412; *Tallman v. Atlantic Ins. Co.*, 29 How. (N. Y.) 71; *Tillou v. Kingston Mut. Fire Ins. Co.*, 7 Barb. (N. Y. Sup. Ct.) 570; *Wilson v. Genessee County Mut. Ins. Co.*, 16 Barb. (N. Y. Sup. Ct.) 511.

⁴ 23 Barb. (N. Y.) 623.

within the meaning of a provision making the policy void on such transfer or change,¹ but also that a sale by one partner to his copartners of his interest, and withdrawal from the firm, is an alienation.² And so also that a sale by one tenant to his co-tenant is an alienation.³ So a division on petition for partition by one co-tenant against another has been held to be a change in the title, though not strictly an alienation.⁴

§ 281. **Change of Ownership — Right of Action.** — And the same difference of opinion prevails as to the proper parties to the action in the respective cases. By some of the authorities it is held that, in case of the sale and transfer by one partner to his copartners of his interest, and his retirement from the firm, an action cannot be maintained in the name of the joint insurers, since it cannot be truly alleged that all the parties were interested at the time of the loss, and, of course, there being no joint property there could be no joint loss.⁵ The prudent course in cases where the title to the property has been so changed is to assign the policy and obtain the assent of the insurers to the assignment, when, upon all the authorities, the remaining owner or owners may sue in their own names.

It is, however, elsewhere held that the action must be joint, and that if the sale or transfer, as of one partner of his interest to the other, is without the consent of the insurers, the plaintiff will recover only the value of his interest; while, if it is with their consent, he will recover to the same extent as if there had been no transfer.⁶ And in still another case it

¹ *Dreher v. Etna Ins. Co.*, 18 Mo. (3 Bennett) 128.

² *Dix v. Mercantile Ins. Co.*, 22 Ill. 272; *Keeler v. Niagara Fire Ins. Co.*, 16 Wis. 523; *Hartford Fire Ins. Co. v. Ross*, 23 Ind. 179; *Finley v. Lycoming County Mut. Ins. Co.*, 30 Penn. St. 311.

³ *Buckley v. Garnett et al.*, 47 Penn. St. 404.

⁴ *Barnes v. Union Mut. Fire Ins. Co.*, 51 Me. 110.

⁵ *Dix v. Mercantile Ins. Co.*, 22 Ill. 272; *Murdock v. Chenango County Mut. Ins. Co.*, 2 Comst. (N. Y.) 210; *Howard et al. v. Albany Ins. Co.*, 3 Denio (N. Y.), 301.

⁶ *Hobbs et al. v. Memphis Ins. Co.*, 1 Sneed (Tenn.), 444. In this case the court say, referring to the New York cases in the 2d of Comstock and the 3d or Denio, before cited, that they have carefully considered them, and do not concur in the doctrine thereof, nor consider it founded in principle or authority.

was held, that where the surviving partner, by one of the articles of copartnership, became sole owner on the death of his copartner, he might recover in his own name for the loss of the goods formerly the property of the firm, destroyed by fire, though the insurers were ignorant of the agreement.¹ And where a sole trader sells an undivided interest in the insured property to another, who thereby becomes a partner, the insurers assenting to the transfer, and that the policy should remain good to the new firm, and making the alienee a member of their company by the entry of his name in their books as such, it has been held, somewhat strictly, perhaps, that no action at law could be maintained by either of the parties severally, or by both jointly, since neither jointly nor severally did they own the property at the time of the insurance and at the time of the loss. But since, under the circumstances, there was no adequate remedy at law, a joint bill in equity to recover the loss was sustained.²

§ 282. **Waiver.** — But a forfeiture by alienation may be waived by the insurers or their agent; and a consent by the agent, who, after notice of the alienation by the insured, forwards the policy to his principals for their approval, that the policy shall remain good till the assent of the insurers to the assignment can be procured, is such waiver.³

¹ *Wood v. Rutland and Addison Mut. Fire Ins. Co.*, 31 Vt. 552. And see also *Baltimore Fire Ins. Co. v. McGowan*, 16 Md. 47.

² *Bodle et al. v. Chenango County Mut. Ins. Co.*, 2 Comst. (N. Y.) 53. But see *Foster et al. v. Equitable Mut. Fire Ins. Co.*, 2 Gray (Mass.), 416.

³ *Illinois Mut. Fire Ins. Co. v. Stanton*, Sup. Ct. Ill., 1872, 2 Ins. L. J. 29. And see also, *post*, chapter on Waiver and Estoppel.

CHAPTER XI.

OF THE SPECIAL PROVISIONS OF THE CONTRACT (*continued*).

§ 283. **Title and Property distinguished.** — “Title” has respect to that which is the subject of ownership, and is that which is the foundation of ownership, and with a change of title the right of property — the ownership — passes. “Property” is a thing owned, that to which a person has, or may have, a legal title. Both words are inappropriate to describe the insurable interest which exists solely by reason of the personal liability of the insured for the payment of a sum of money charged upon the building or goods insured. When, therefore, the word “property” is used in the clause forbidding alienation, it is used to designate the thing insured, and not the interest of the insured in the thing; and “change or transfer of title” in the property insured is change or transfer of title and ownership of the thing insured.¹ The title or interest of the assured in the property insured is no part of the description of the property, and need not therefore be mentioned in answer to a call for a true description of the property.²

§ 284. **Title.** — In general, unless the title, ownership, or interest in the insured property is required by the conditions of the policy to be specifically, and with particularity and accuracy, set forth, it will be sufficient if the insured has an insurable interest, under any status of ownership or possession. And the fact that the statements in the application are by reference made a part of the contract, and thus become warranties, will have no effect in extending the force or effect of these statements beyond their actual import. Thus, where a mar-

¹ Springfield Fire and Mar. Ins. Co. v. Brown, 43 N. Y. 389.

² Franklin Ins. Co. v. Coates, 14 Md. 285.

ried woman had been abandoned by her husband, but, with the family, remained on the homestead, which had been occupied by them before the separation, and with her own earnings made improvements from time to time, it appearing that the husband, on leaving, made a verbal gift of the property to her, it was held that she had an insurable interest. Application was made for insurance upon one dwelling-house and certain personal property therein contained, and to the question whether the title was a warranty deed or a bond, the answer was, "W. D." And to the further question, "Is your property incumbered?" the answer was, "None." These being all the statements in the application touching the title of the insured, it was alleged in defence that there was a breach of warranty, and no proof of ownership in fee. But the court said, "We fail to find by the application of the meaning attached to words that the insured represented herself as holding any particular kind of title. The words 'one dwelling-house' do not import title of any kind. The letters 'W. D.' have no such meaning; nor has the question, 'Is your property incumbered?' If the letters 'W. D.' mean a warranty deed, it must appear from extrinsic evidence, if that could be received. They have no such fixed and definite meaning in the law, nor in any common use, nor even in the connection in which they are employed. That may be their meaning, but it is not apparent. But if it was conceded that they mean that the insured's title was a warranty deed, still that is not an assertion that such title is a fee. A warranty deed may pass a term of years, a life-estate, a fee, or less estate, or it may pass no estate whatever. It conveys only the estate of the grantee, whatever that may be. If he have none, it can pass none to the grantee. We then look in vain for any assertion in the application as to the kind of title, or the nature of the estate she claimed. It then does not appear from the application that she was required to prove that she held a fee or other absolute estate in the lot and house. Then, under the averment in the declaration, what was she bound to prove? Manifestly that she held and owned an insurable interest,—

such a title as if there should be loss it would fall upon, and have to be borne by her. In a declaration on a policy of insurance, the averment that the insured was the owner of the property destroyed must be considered with reference to the contract of insurance. It amounts to an averment that the insured had an insurable interest, and not that he was the absolute owner of the property. When he sues, his right to recover depends upon whether he was the owner of an insurable interest, and not whether he was the absolute owner, and the averment must be so construed. It cannot be construed as it would be in a contract or covenant to convey land, as in such case the thing sold and purchased is the land, and when the vendor says, in his covenant, that he is the owner, and agrees to convey it to another, the law holds that as the parties understood by the covenant that it was the land that was sold, that the assertion of ownership implied that the vendor held the absolute title, and had agreed to convey such a title as would vest in the vendee absolute ownership. Language not having a technical meaning must be construed with reference to the subject to which it is applied. Thus, under either the application for the insurance, or the averment in the declaration, the insured was bound only to prove that she held an insurable interest, and all questions beyond that were immaterial.”¹

§ 285. Title — Ownership — Interest. — The insured is not

¹ *Rockford Ins. Co. v. Nelson*, Sup. Ct. Ill., 2 Ins. L. J. 341. In *Catron v. Tennessee Insurance Company*, 6 Humph. (Tenn.) 176, a tenant in common, owning one-half, applied for insurance in these words: “I wish a furnace and forge insured,” without any thing further said, or required to be said, about the title or interest of the insured. And the court held this a misrepresentation as to the interest, which avoided the policy. But neither the cases cited and relied upon by the court, nor any others that we have been able to find, support so extravagant a doctrine. There were other and sufficient grounds for the decision, and it is evident, from an examination of the opinion, that the court were penetrated, if not influenced, by a confident belief that the insured set fire to his own property. And the early cases in the Supreme Court of the United States (*Columbian Ins. Co. v. Lawrence*, 2 Peters, 25; s. c. 10 Peters, 507; and *Carpenter v. Prov. Wash. Ins. Co.*, 16 Peters, 495), opposed to the doctrine stated in the text, have not received the approbation of the State courts. *Franklin Fire Ins. Co. v. Coates*, 14 Md. 285. And see § 285.

bound to state the nature or particulars of his title, unless they are inquired about, or required to be disclosed by the provisions of the policy. A statement that the property is his, if in fact it be his in some substantial sense, is sufficient; as where the property insured stands upon the land of another, subject to the right of removal in the assured;¹ or has been seized on execution;² or is an equity of redemption;³ or the insured is tenant for years;⁴ or there is an outstanding agreement to convey, upon which a portion of the purchase-money has been advanced;⁵ or the insured is a joint owner, in which case he may recover to the extent of his interest,⁶ especially if his copartner be only interested in the profits.⁷ The interest of the partner in such a case, who in fact owns the stock of goods, is an absolute equitable interest, and is protected by a policy which is to be void if the interest of the insured be not an absolute one.⁸ So where the insured, in reply to a question,—the policy containing no stipulation as to disclosure of title,—answered that the land on which the insured building stood was hers, when in fact she had only a life-estate thereon, but her husband's will had made no disposition of the remainder, and the heirs, during the twelve years which had passed since the probate of the will, had made no claim to the property, it was held that the answer was substantially true.⁹ So if the insured is in possession of a house under an executory contract on which part payment has been made.¹⁰ If the in-

¹ *Curry v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535; *Fletcher v. Same*, 18 Pick. (Mass.) 419; *Morrison v. Tenn. Mar. and Fire Ins. Co.*, 18 Mo. 262; *Sussex County Mut. Ins. Co. v. Woodruff*, 2 Dutch. (N. J.) 541.

² *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40.

³ *Buffum v. Bowditch Mut. Ins. Co.*, 10 Cush. 540.

⁴ *Niblo v. North American Ins. Co.*, 1 Sand. (N. Y. Sup. Ct.) 551.

⁵ *Davis v. Quincy Mut. Fire Ins. Co.*, 10 Allen (Mass.), 113.

⁶ *Hartford Prot. Ins. Co. v. Harmer*, 2 Ohio St. 452. And see also *Peck v. New London Mut. Ins. Co.*, 22 Conn. 575.

⁷ *Irving v. Excelsior Fire Ins. Co.*, 1 Bosw. (N. Y. Superior Ct.) 507.

⁸ *Ibid.* And see also *Collins v. Charlestown Mut. Fire Ins. Co.*, 10 Gray (Mass.), 155; *Gould v. York County Mut. Ins. Co.*, 47 Me. 403.

⁹ *Allen v. Charlestown Mut. Fire Ins. Co.*, 5 Gray (Mass.), 384.

¹⁰ *Tyler v. Ætna Ins. Co.*, 16 Wend. (N. Y.) 385; s. c. 12 Wend. (N. Y.) 507.

surer be the owner of an equity of redemption, it is likewise sufficient; since an equity of redemption is a right, and is a real interest in the land, created and secured by the law, to which a lien will attach, so that when the insured states the property in his possession to be his, he sufficiently states the true title, in the absence of specific inquiries.¹ And though the vendor make out a bill of sale of personal property, and receives a note secured by a mortgage in consideration for the sale, if there be no delivery of the bill of sale, the property will not thereby be divested out of the vendor, so that a warranty that the property is his will be broken.²

§ 286. **Mortgagor of Personal Property.** — And in Iowa it is also held that the mortgagor of chattels is the “sole and unconditional owner” of the mortgaged property.³ But Miller, J., in his dissenting opinion in the last-cited case, takes a distinction between mortgages of real, and mortgages of personal property, based upon the statute, which, as the statutes of other States may have similar provisions, it may be of importance to note. “Without stopping to inquire,” says the learned judge, “into the rights of mortgagors at common law, it is sufficient to show that by our statute, in the absence of stipulations to the contrary, the mortgagor of *real property* retains the legal title and right of possession thereof, *but in the case of personal property, the mortgagee holds that title and right.* Here the statute confers the title and the rights of possession on the mortgagee of chattels, the mortgagor having a naked equity of redemption, a mere right to defeat the title of the mortgagee by a performance of the condition of the mortgage, and on a failure to comply with those conditions the mortgagee becomes the absolute owner.⁴ The mortgagor of personal property is so far from having any ownership in the goods covered by the mortgage, that he has no interest therein

¹ Buffum v. Bowditch Mut. Fire Ins. Co., 10 Cush. (Mass.) 540.

² Vogel v. People's Mut. Fire Ins. Co., 9 Gray (Mass.), 23.

³ Hubbard et al. v. Hartford Fire Ins. Co., Sup. Ct. Iowa, 1871, 1 Ins. L. J. 178, 33 Iowa, 325.

⁴ Bean v. Barney & Scott, 10 Iowa, 498.

which can be levied upon and sold under execution; unless *by the terms of the mortgage* he is entitled to, and in fact retains, the possession.¹ In what sense, then, can it be said that the mortgagor of personal property is 'considered the owner'? None whatever; much less can it be maintained that he is the 'sole and unconditional owner.'

§ 287. **True Title.** — If, however, the "true title" is called for, and this is generally the case in mutual insurance companies, as the lien which they rely upon as security depends upon the title, a failure to set forth the title with substantial accuracy will amount to a misrepresentation or a concealment, as the case may be. As where the insured describes the property as his when he has only a bond for a deed;² or is a stockholder in a corporation which owns the property;³ or is only a tenant by the curtesy;⁴ or a lessee with or without an agreement for purchase;⁵ or the assignee of a lessee with right to purchase;⁶ or a mortgagee;⁷ or has only an imperfect tax title;⁸ or, for the purpose of defrauding his creditors, has conveyed away his estate, without consideration, to another, who promises to reconvey upon request;⁹ or is the owner of only one of seven parcels of the property insured.¹⁰ In such case the policy will not cover even that the title to which is truly

¹ *Campbell v. Leonard*, 11 Iowa, 489; *Bindschopf Bros. & Co. v. Lyman*, 16 Iowa, 260.

² *Smith v. Bowditch Mut. Ins. Co.*, 6 Cush. (Mass.) 448; *Brown v. Williams*, 28 Me. 262; *Falis v. Conway Mut. Fire Ins. Co.*, 7 Allen (Mass.), 46; *Birmingham v. Empire Ins. Co.*, 42 Barb. (N. Y.) 457.

³ *Philips v. King's County Mut. Ins. Co.*, 20 Ohio, 174; *Abbott v. Shawmut Mut. Fire Ins. Co.*, 3 Allen (Mass.), 213.

⁴ *Leathers v. Ins. Co.*, 4 Fost. (N. H.) 259; *Eminence Mut. Ins. Co. v. Jesse*, 1 Met. (Ky.) 523.

⁵ *Shaw v. St. Lawrence County Mut. Ins. Co.*, 11 Upper Canada (Q. B.), 73; *Marshall v. Columbian Mut. Ins. Co.*, 7 Fost. (N. H.) 157.

⁶ *Walroth v. St. Lawrence County Mut. Ins. Co.*, 10 Upper Canada (Q. B.), 525.

⁷ *Jenkins v. Quincy Mut. Fire Ins. Co.*, 7 Gray (Mass.), 370; *Brown v. Gore Dist. Mut. Ins. Co.*, 10 Upper Canada (Q. B.), 383.

⁸ *Pinkham v. Morang*, 40 Me. 587.

⁹ *Treadway v. Hamilton Mut. Ins. Co.*, 29 Conn. 68.

¹⁰ *Day v. Charter Oak Fire and Mar. Ins. Co.*, 51 Me. 91.

represented.¹ If, however, the policy of a mutual insurance company, whose charter gives a lien upon real estate, does not call specifically for the true title, no description of the title need be given. A general answer that the property belongs to the insured, or to that effect, is sufficient.² And in *Clapp v. Union Mutual Insurance Company*,³ a judgment creditor, to whom the insured property had been set off on execution, subject to two mortgages to other parties, and to the debtor's unexpired equity of redemption, was held not to have misrepresented his title and interest in stating the property to be his own. In like manner, in *Chase v. Hamilton Mutual Insurance Company*,⁴ the insured, who had been in possession of the land several years under an executory agreement for the purchase thereof, and had erected thereon the building insured, and before the application for insurance had paid all the purchase-money, though he had not then taken the legal title, was held to have stated his "true title and interest," in representing the house and land to be his. So where the purchase was at a sale under foreclosure of a mortgage, and the property was destroyed before the deed was passed, it was held that when the deed was passed it took effect as of the day of the sale, and that the insured then had the legal title, subject to an equity of redemption, and truly answered that they were the owners.⁵ An answer to a question as to incumbrances, stating that the applicant, a mortgagee in possession, was first mortgagee, taken together with the fact that the application was for insurance on "dwelling-house," not stated to be the applicant's, is a sufficient statement of the "true title" of the insured.⁶ And a description of the insured as

¹ *Wilbur v. Bowditch Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 446.

² *Allen v. Mut. Fire Ins. Co.*, 2 Md. 111. In this case the title was in point of fact such as to give a lien. *Allen v. Charlestown Mut. Fire Ins. Co.*, 5 Gray (Mass.), 384. In this case the title was a life-estate under a will subject to contingent possible reduction to an estate in dower. *Sussex County Mut. Ins. Co. v. Woodruff*, 2 Dutch. (N. J.) 541. *Contra*, *Mahar v. Mut. Ass. Co.*, 5 Call (Va.), 517; *Mut. Ins. Co. v. Deale*, 18 Md. 26.

³ 7 Fost. (N. H.) 143.

⁴ 22 Barb. (N. Y.) 527.

⁵ *Gaylord v. Lamar Fire Ins. Co.*, 40 Mo. 13.

⁶ *Wyman v. People's Equity Ins. Co.*, 1 Allen (Mass.), 301.

mortgagees is a sufficient statement of the interest of the insured, under a provision that if the interest of the insured be "any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the insured," it must be so expressed in the written part of the policy, and is a true statement of their interest as "mortgagee or otherwise."¹ And a mortgage must be disclosed where the "true title and interest" are required.²

§ 288. **Title — Absolute Interest — Leasehold Interest.** — When the policy provides that if the interest to be insured be a leasehold interest, or any interest not absolute, it must be so represented, upon penalty of forfeiture, reference is made to the character, not the quantity, of the interest. An absolute interest is equivalent to vested interest, or an interest so completely vested that the party owning it cannot be deprived of it without his consent. Interest and title are not synonymous. Thus, where the insured had entered into possession, and made valuable improvements, under a parol contract of purchase at an agreed price, part of which had been paid, and his interest was such that the loss would fall upon him if the property should be destroyed, it was held that a statement by the insured that the property was his, was true, and his interest was an absolute one.³ And where the insured owned the building insured, — a four-story brick building, — and had a lease of the land upon which it stood, stipulating that a two-story brick building should be left upon the land at the expiration of the term, the interest was held to be properly stated as his own, and was not a leasehold interest.⁴ So where the policy was to be void if the interest in the property insured was a leasehold, or other interest not absolute, and the insured owned the buildings, but had only a lease for years of the land upon which they stood, with the right to remove the buildings at the end of the term, it was held that the insured

¹ *Williams v. Roger Williams Ins. Co.*, 107 Mass. 377.

² *Bowditch Mut. Fire Ins. Co. v. Winslow*, 3 Gray (Mass.), 415; s. c. 8 ib. 38.

³ *Hough v. City Fire Ins. Co.*, 29 Conn. 10. And see also *Irving v. Excelsior Fire Ins. Co.*, 1 Bosw. (N. Y. Superior Ct.) 507; *ante*, § 285.

⁴ *David v. Hartford Fire Ins. Co.*, 13 Iowa, 69.

might recover.¹ But where the insured was in possession only under an agreement to purchase, having paid but a part of the purchase-money, the policy was held to be void, the insured not having an absolute estate.² So an interest under a statutory mechanic's lien, not yet confirmed by a decree of court, upon a building standing upon leased land, is covered by a policy which is by its terms to be void if the interest of the insured be a leasehold or other interest not absolute.³ But a building standing on leased land, and not described as such, will not be protected by a policy expressly excluding such property from its protection, unless specifically so described and insured as such.⁴

§ 289. **Fee-simple — Good and perfect unincumbered Title.** — An equitable fee-simple is a title in fee-simple, though the legal title do not pass. Thus, a purchaser in possession, but under a defectively executed deed, has an equitable title in fee-simple. A "less estate" than a fee-simple means an estate of less duration than a fee-simple.⁵ "A good and perfect unincumbered title" implies a title good both at law and in equity; and an outstanding mortgage, undischarged of record, though in fact paid, is a breach of a condition that the property insured has such a title. An insurance company which relies upon its lien might find difficulty in enforcing its lien against such an outstanding mortgage. The proof of payment might not be obtainable, and it is not unreasonable to suppose that a perfect title is required expressly to avoid such difficulties.⁶ Nor can a husband truly state that real estate belonging to his wife is his, when the charter of the company requires that the assured must have a fee-simple estate, or if less than that, the true interest must be stated or the policy will be void.⁷

¹ *Hope Ins. Co. v. Brolasky*, 35 Penn. St. 282.

² *Reynolds v. State Mut. Ins. Co.*, 2 Grant (Penn.), 326.

³ *Longhurst v. Conway Fire Ins. Co.*, U. S. Dist. Ct. Iowa, 1861, cited in *Digest of Fire Insurance Decisions*, 2d ed., by Clarke, p. 584.

⁴ *Kibbe v. Hamilton Mut. Ins. Co.*, 11 Gray (Mass.), 163.

⁵ *Swift v. Vermont Mut. Fire Ins. Co.*, 18 Vt. 305.

⁶ *Warner v. Middlesex Mut. Ass. Co.*, 21 Conn. 444. But see *post*, § 292.

⁷ *Eminence Mut. Ins. Co. v. Jesse*, 1 Met. (Ky.) 563. In this case the ques-

§ 290. *Incumbrance.* — The general object of the inquiry as to incumbrance is to ascertain the amount of the interest of the insured in the property as affecting the judgment of the insurers upon the value of the risk, by taking into consideration the motive which the insured may have in the preservation of the property. Mutual insurance companies are also interested to know the amount of the incumbrance with reference to the value of any lien which they may have for the security of the payment of assessments. Statements as to incumbrance are material, and have regard to the risk.¹ Where the fact of incumbrance is required to be stated by special conditions or by specific inquiry, a general statement of the fact, without giving the particulars, or the amount, is sufficient, even though the amount be called for, if a policy be issued upon the incomplete and general answer. The acceptance of the risk and issue of the policy on the general answer will be deemed a waiver on the part of the insured of further particulars.² But if no answer at all be given to the inquiry, it has been held to be the equivalent of a negative answer, and to avoid the policy.³ And if the insured undertake to state the number of mortgages, and does not state them truly, his policy will be void.⁴ And if both real and personal property be insured, and two mortgages exist, one on both the real and personal property, and the other on the real alone, a failure to state either mortgage will avoid the policy as to both kinds of property insured.⁵ And a substantially untrue state-

tion was, "Have you a clear title to the property which you wish to be insured?" to which the answer was, "It was the house of J. P. Foree, whose title was as good as any man's in the country, and who was the father of my wife."

¹ *Friesmuth v. Agawam Mut. Ins. Co.*, 10 Cush. (Mass.) 588; *Patten v. Merchants' and Farmers' Ins. Co.*, 38 N. H. 338; *Richardson v. Maine Ins. Co.*, 46 Me. 394; *Gahagan v. Union Mut. Ins. Co.*, 43 N. H. 176.

² *Nichols v. Fayette Mut. Fire Ins. Co.*, 1 Allen (Mass.), 63; *Wyman v. People's Equity Ins. Co.*, 1 Allen (Mass.), 301.

³ *Löchner v. Home Mut. Ins. Co.*, 17 Mo. 247.

⁴ *Towne v. Fitchburg Mut. Fire Ins. Co.*, 7 Allen (Mass.), 51; *Smith v. Empire Ins. Co.*, 25 Barb. (N. Y.) 497; *Battles v. York County Mut. Ins. Co.*, 41 Me. 208.

⁵ *Brown v. People's Mut. Ins. Co.*, 11 Cush. (Mass.) 280.

ment of the amount will also avoid the policy.¹ And that, too, without reference to the fact that the company is a foreign one, and has no lien in the State where the insurance is made.² And in the amount should be included accrued interest.³

§ 291. *Incumbrance, what is.* — A mortgage, of course, is an incumbrance,⁴ though without consideration, and therefore fraudulent and void as against creditors,⁵ and though unrecorded, if delivered;⁶ although the insured did not acquire title till after the date of the mortgage.⁷ So is a lien for taxes;⁸ and a mechanic's lien;⁹ and an attachment;¹⁰ and a seizure on execution;¹¹ and a title under a sale on execution, subject to the debtor's equity of redemption;¹² and an assessment upon a deposit note to pay a loss;¹³ and a lien for a balance due of the purchase-money where the purchaser is in possession under an agreement for purchase, having paid part of the purchase-money.¹⁴

§ 292. *Incumbrance, what is not.* — A mortgage which has been paid, though not discharged of record, is no longer an incumbrance.¹⁵ Nor is a bond for the conveyance of the premises insured, upon the payment of the purchase-money at a specified time, although the forfeiture on account of the expiration of the time has been waived, if, in fact, the money

¹ *Lowell v. Middlesex Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 127; *Hayward v. New Eng. Mut. Ins. Co.*, 10 Cush. (Mass.) 444.

² *Davenport v. New Eng. Mut. Ins. Co.*, 6 Cush. (Mass.) 340.

³ *Jacobs v. Eagle Mut. Fire Ins. Co.*, 7 Allen (Mass.), 132.

⁴ *Masters v. Madison County Mut. Ins. Co.*, 11 Barb. (N. Y.) 624.

⁵ *Treadway v. Hamilton Mut. Ins. Co.*, 29 Conn. 68.

⁶ *Hutchins v. Cleveland Mut. Ins. Co.*, 11 Ohio St. 477.

⁷ *Packard v. Agawam Mut. Fire Ins. Co.*, 2 Gray (Mass.), 334.

⁸ *Wilbur v. Bowditch Mut. Ins. Co.*, 10 Cush. (Mass.) 446.

⁹ *Longhurst v. Conway Fire Ins. Co.*, U. S. Dist. Ct. Iowa, 1861, cited in *Digest of Fire Ins. Decisions* (2d ed.), p. 247.

¹⁰ *Brown v. Commonwealth Ins. Co.*, 41 Penn. St. 187.

¹¹ *Penn. Ins. Co. v. Gottsman*, 48 Penn. 158.

¹² *Campbell v. Hamilton Mut. Ins. Co.*, 51 Me. 69.

¹³ *Jackson v. Farmers' Mut. Fire Ins. Co.*, 5 Gray (Mass.), 52; *Tuttle v. Robinson*, 33 N. H. 104.

¹⁴ *Reynolds v. State Mut. Ins. Co.*, 2 Grant (Penn.), 326.

¹⁵ *Hawkes v. Dodge County Mut. Ins. Co.*, 11 Wis. 188. But see *Warner v. Middlesex Mut. Ass. Co.*, 21 Conn. 444, *ante*, § 289.

has not been paid.¹ In *Jackson v. Farmers' Mutual Fire Insurance Company*,² the question arose whether a liability for an assessment on a deposit note, laid under a policy which was afterwards declared void on account of an increase of the risk, was an incumbrance such as ought to have been disclosed by the insured in a new policy taken out from another company after the increase of risk and before the policy was declared void, and was discussed, though not decided, with an evident inclination to the negative. "It will be a grave question, we think," says Shaw, C. J., "whether a remote contingent liability or possibility of charge for a very minute assessment is an incumbrance within the meaning of this contract of insurance. Perhaps a different rule may apply in covenants against incumbrances, because founded on a different reason; thus a purchaser, having paid a full compensation for the estate, with all its benefits, has a right to expect in his grant and covenants an indefeasible title without further charge. . . . It is, in effect, a stipulation that if there be any charge upon the estate, known or unknown, the vendor of the estate will pay the expense of removing it. Should the same rule apply to this subject of representation with a view to insurance, every married man making application for an insurance, in answer to the question whether his estate is incumbered, must state that he has a wife living, otherwise the policy would be void."

§ 293. *Incumbrance — Several Mortgages.* — If a mortgagee insures his interest as mortgagee, under a provision calling for incumbrances calculated to affect the interest, other mortgages should be stated.³ But where the insurance is specifically upon the particular interest, and not upon the property, other incumbrance upon the property need not be stated; as where a "mechanic's lien on the Lawrence Block" was specified as the subject-matter of insurance, and a negative answer to the

¹ *Newhall v. Union Mut. Fire Ins. Co.*, 52 Me. 180.

² 5 Gray (Mass.), 52.

³ *Addison v. Ken. and Lou. Ins. Co.*, 7 B. Mon. (Ky.) 470; *Smith v. Columbia Ins. Co.*, 17 Penn. St. 253; *Rex v. Insurance Companies*, 2 Phila. (Penn.) 357.

question whether "it" was incumbered was given, it was held that this was no misrepresentation, although there were other liens upon the same block.¹

§ 294. *Incumbrance made after Application.* — In *Howard Fire Insurance Company v. Bruner*,² application was made for insurance July 17, and the policy countersigned and issued on the 25th of the same month. A mortgage existing on the 17th was disclosed in the application, but a mortgage executed on the 25th, and after the delivery of the policy, was not disclosed. And it was held that it need not be, as it was a subsequent incumbrance, whereas the inquiry related only to existing incumbrances. And in *Dutton v. New England Mutual Fire Insurance Company*, a mortgage executed on same day when the policy was issued, but whether before or after delivery of the policy did not appear, was held to be a subsequent incumbrance which the applicant was not bound to disclose in reply to the interrogatory on that point, whether executed before or after the delivery of the policy, as it was not an incumbrance when the application was filed and the answer made, five days before. What would be the effect if the mortgage was in contemplation at the time the application was filed, and purposely kept open till after the delivery of the policy, was not decided. But it was intimated that such facts might amount to a fraudulent concealment of a fact material to the risk. Where a policy was assigned by consent of the insurers to the plaintiffs, and afterwards the insured mortgaged the property insured to the plaintiffs to protect them as accommodation indorsers for the insured, it was held that this was not such an incumbrance as was contemplated in the policy which provided for notice of any incumbrance "sufficient to reduce the real interest of the insured to a sum only equal to, or below, the amount insured."³ But it certainly seems an extremely liberal interpretation in favor of the insured, to protect him against the consequences of a material change, effected by himself, in the status of the property insured, between the time of the application and that

¹ *Longhurst v. Conway Fire Ins. Co.*, U. S. Dist. Ct. Iowa, 1861.

² 23 Penn. St. 50.

³ *Allen v. Hudson River Mut. Ins. Co.*, 19 Barb. (N. Y.) 443.

of issuing the policy, by holding that the insurance is by relation from the date of filing the application. Besides opening a wide door to fraud, it does not seem to be in accordance with the well-settled doctrine that a material change intervening, pending the negotiations, ought to be disclosed.¹

¹ See *ante*, § 190.

CHAPTER XII.

OF THE SPECIAL PROVISIONS OF THE CONTRACT (*continued*).

§ 295. **Good Health — Healthy Life.** — In the early history of life insurance in England, and before the officers had acquired the art or indeed seen the necessity of hedging the insured about with warranties, in *Ross v. Bradshaw*¹ it was held, by Lord Mansfield, that a warranty of good health meant simply that the applicant was in a reasonably good state of health, and was such a life as ought to be insured on common terms. That it did not mean that he was free from every infirmity, and in fact though he had one, the life might be a good one; and the fact that insured had several years before received in battle a wound in the loins, which so affected him that he could not retain his urine or fæces, though not mentioned, was not inconsistent with a good insurable life. And about twenty years later, in *Willis v. Poole*,² where it appeared the insured was at times troubled with spasms from violent fits of the gout, though at the time of insurance in his usual state of health, Lord Mansfield said: "The imperfection of language is such that we have not words for every different idea, and the real intention of the parties must be found out by the subject-matter. By the present policy the life is warranted to some of the underwriters, *in health*; to others, *in good health*. And yet there is no difference in point of fact. Such a warranty can never mean that a man has not in him the seeds of some disorder. We are all born with the seeds of mortality in us. A man subject to the gout is a life capable of being insured, if he has no sickness at the time to make it an unequal contract." In *Watson v. Mainwaring*³ there was a warranty that the insured was free from any "disorder tending to shorten life," while in

¹ 1 W. B. 312, A.D. 1760.² 2 Parke, Ins. 650.³ 4 Taunt. 763.

fact the applicant was afflicted with a disorder of the bowels, which might proceed either from a defect of the internal organs, which would tend to shorten life, or it might proceed from dyspepsia, which would not, unless organic and excessive; and it was left to the jury to say whether it was dyspepsia or not, and, if so, whether it was organic and excessive. "All disorders," said *Chambre, J.*, "have, more or less, a tendency to shorten life; even the most trifling, — corns may end in mortification. That is not the meaning of the clause. If dyspepsia were a disorder that tended to shorten life within the exemption, the lives of half the members of the profession of the law would be uninsurable." A disease tending to shorten life is one which has a continuing tendency, and not stating one which might or might not have produced that result is no concealment.¹ Of course if there is no warranty the insurers take every risk, where there is no fraud, as by misrepresentation or concealment.² "Good health" does not import a perfect physical condition. The epithet "good" is comparative, and does not ordinarily mean that the applicant is free from infirmities. Such an interpretation would exclude from the list of insurable lives a large proportion of mankind. The term must be interpreted with reference to the subject-matter and the business to which it relates. Slight troubles, not usually ending in serious consequences, and so unfrequently that the possibility of such result is usually disregarded by insurance companies, may be regarded as included in the term good health.³ "Good health" means apparent good health, without any ostensible, or known, or felt symptom of disorder, and does not exclude the existence of latent unknown defects.⁴ The fact that death may ensue, and in fact does unexpectedly ensue in the particular case, from one of these slight troubles, is of no importance.⁵ But a predisposition to a disease, — dyspepsia for instance, — of such a character and to such a degree as to seriously affect the

¹ *Rose v. Star Ins. Co.*, 2 Irish Jurist, o. s. 206.

² *Stackpole v. Simon*, 2 Parke, Ins. 648.

³ *Peacock v. N. Y. Life Ins. Co.*, 20 N. Y. 293, affirming s. c. 1 Bosw. (N. Y. Superior Ct.) 338.

⁴ *Hutchinson v. Nat. Loan Ass. Soc.*, 7 Ct. of Sess. (Scotch) 2d ser. 467.

⁵ *Watson v. Mainwaring*, 4 Taunt. 763.

health and to produce bodily infirmity, is incompatible with a warranty of good health.¹ A "healthy life" is a good life, one that would be taken at common rates; and one which would be charged higher than the usual rate of premium is not a healthy life.² And a "drunken fellow" is not a good life.³ Equivocation in the answers touching health is of course as fatal as falsehood.⁴

§ 296. **Serious Illness — Tendency to shorten Life.** — The ordinary question whether the applicant has ever had any serious illness, as the word serious is a relative term, involving a question of degree, and it being certain that there are all degrees of illness from the slightest, about which no concern is felt by any one, to the most aggravated, attended by the most alarming developments and the most serious consequences, about which there is everywhere the highest degree of concern, and as even a disease regarded in its course as of the most trivial in its character may be followed by the most serious results, seems to be a question of opinion, the expression of which should be based upon intelligence and good faith. What one may call serious another might not; and where there is no test furnished by the insurers by which the applicant can know what serious illness means, his failure to mention one which he does not regard as serious works no forfeiture of the policy, though in fact the illness not mentioned was a serious one.⁵ So, if the inquiry be as to the prior existence of disease having a tendency to shorten life, or rendering an assurance upon it more than usually hazardous. An honest belief in the truth of his answer is all that is required of the applicant. He may have had repeated attacks of disease, but if he does not know or have reason to believe that they come within the range of the inquiry, his failure to answer is immaterial, even though in

¹ N. Y. Life Ins. Co. v. Flack, 3 Md. 341.

² Brealy v. Collins, 1 You. 317; Ross v. Bradshaw, 1 W. Bl. 312.

³ Weskett, Ins. 235. In Taylor's Medical Jurisprudence may be found many valuable suggestions on the subject of representation as to health and disease and personal habits, with references to some cases not elsewhere reported. Phila. ed. 1866, 738 *et seq.*

⁴ Smith v. Ætna Life Ins. Co., 49 N. Y. 211.

⁵ Hogle v. Guardian Life Ins. Co., 6 Rob. (N. Y. Superior Ct.) 567.

point of fact they had a tendency to shorten life and to increase the hazard of the risk. "In the argument," said the court,¹ "we were referred by the defendant's counsel to several authorities, — amongst others, *Lindeneau v. Desborough*,² — establishing the proposition, which, as a rule, is indisputable, that it is the duty of a party effecting an insurance on life or property to communicate to the underwriters or other insurer all material facts within his knowledge, touching the subject-matter of insurance, and that it is a question for the jury whether any particular fact was or was not material to be communicated. It is, however, equally clear that the underwriters may in any particular case limit their right in this respect to that of being informed of what is in the knowledge of the assured, not only as to its existence in point of fact but as to its materiality; and in our opinion that is the effect of the limited declaration required in the present case as to disorders or circumstances tending to shorten life or to render an insurance upon the life insured more than ordinarily hazardous." In such cases the rule seems to be that if the inquiry call for an answer which involves a matter of opinion, the applicant is answerable only for the honesty of his opinion, although the answer be untrue in fact. And substantially the same rule was laid down in *Hutchinson v. National Loan Assurance Society*,³ where the inquiry was whether any material circumstances touching health or habits of life with which insurers ought to be made acquainted was withheld, and it was decided that the answer was only a warranty to the extent of the knowledge and reasonable belief of the insured. "A disease requiring confinement" seems to be one calling for the attendance of a physician.⁴

§ 297. **Subject to or afflicted with Disease.** — And the same rule is applicable to inquiries whether the applicant has been afflicted with any particular disease or symptoms of disease. He is bound to answer in good faith and according to his knowledge, — that knowledge which a man of ordinary intelli-

¹ *Jones v. Provincial Ins. Co.*, 3 C. B. N. s. 65.

² 8 B. & C. 586.

³ 7 Ct. of Sess. Cas. 2d ser. (Scotch) 467.

⁴ *Cazenove v. Brit. Eq. Ass. Co.*, 6 C. B. N. s. 437.

gence ought to have and in law is presumed to have, touching matters relating to his own physical condition and history. Though some of the cases make use of language strong enough to require that he must answer truthfully at his peril, without regard to the applicant's knowledge of, or reason to believe, the truth of the fact as stated or omitted, yet, as we have before seen,¹ the facts in those cases did not require so extreme a ruling; and it may be doubted if, in view of the current of opinion, in a case presenting the exact point, the courts using this language will not be found in accord with the other authorities. Thus where the statement in answer to an inquiry as to a particular disease or infirmity, as that the party has not been "afflicted with" or "subject to" fits, for instance, the interpretation to be put upon the clause is not that the person never had a fit accidentally, but that he was not at the time of the insurance a person habitually or constitutionally afflicted with fits, or a person liable to fits from some peculiarity of temperament, either natural or contracted, from some cause or other.² So, where the question was whether the applicant had ever been afflicted with the gout. "As to the first answer," said Cockburn, C. J., in his charge to the jury, in *Fowkes v. Manchester and London Life Insurance Company*,³ "to the question whether he had ever been afflicted with the gout, no doubt it must be considered with some reasonable latitude, and the answer would not be false merely because he had had some symptoms which an experienced medical man might see indicated the presence of gout in the system. You will probably consider whether there was gout in a sensible appreciable form; and in considering that question you will bear in mind that the medical man himself described the only attack which preceded the policy as the slightest possible case of gout, and that there is no positive evidence that the deceased knew that he had the gout." Where the insurance is upon the life of a third party, the knowledge and good faith of the third party may be imputable to the insured.⁴

¹ *Ante*, §§ 202-205.

² *Chattock v. Shaw*, 1 Mood. & Rob. 498.

³ 3 F. & F. 440.

⁴ *Duckett v. Williams*, 2 Carr. & Marsh. 348; *Forbes v. Ed. Life Ass. Co.*, 10 Ct. of Sess. Cas. (Scotch) 451.

§ 298. **Afflicted with Disease.** — In *Vose v. Eagle Life and Health Insurance Company*,¹ the questions were whether the applicant or any of his family had been afflicted with pulmonary complaints, consumption, or spitting of blood, or whether he was afflicted with any disease or disorder, and the court thought he ought to have stated the “symptoms of consumption which he had, and which he knew he had, and which he had had for five months previous,” in answer to the last interrogatory. But whether this were so or not, the denial that he had been afflicted with pulmonary complaints, consumption, or spitting of blood, under such circumstances, whether regarded as a warranty or representation, avoided the policy. In a later case in the same State, where the question was whether the insured had been “subject to or at all affected by spitting of blood,”² the appellate court held the following language: —

“The court instructed the jury that the repeated spitting of blood, accompanied by a cough, was so far an indication of disease that if the applicant had suffered from it he was bound to have so stated; that if he was subject to occasional spitting of blood, accompanied by a cough, he was bound to have stated that fact; and that the same was true if he had spit blood in a single instance, if recent, and such as to excite apprehension in his own mind that it was the result of disease.

“Considering the various forms and degrees in which the spitting of blood with a cough may manifest itself, the uncertainty as to its source and cause, and the character of the facts which the testimony in this case tended to prove, we cannot say that the rulings of the court ought to have gone further than this in favor of the propositions of the defendant. The mere raising of a small quantity of blood with a cough in a single instance is not necessarily an indication of disease or a material circumstance, so that such an occurrence, however slight, at any time during the previous life of the applicant, would make his answer such a misrepresentation as to require that the court should so declare it as a matter of law.”

And in the same case, on exceptions after another trial, the

¹ 6 Cush. (Mass.) 42.

² *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381.

question being whether the insured had truly answered the same question relative to "bronchitis," the court say: "It was for the jury to decide whether 'chronic bronchitis' or 'bronchial difficulty,' or any other bodily affection or condition to which the assured was found by them to have been subject, amounted to bronchitis, consumption, disease of the lungs, or some other of the infirmities stated in the application, and relied on by the defendants; and whether the spitting of blood by him, if proved to have taken place, was under such circumstances as to indicate disease in his throat, lungs, air passages, or other internal organs." So where the application states that the insured had not had "any spitting of blood, consumptive symptoms," &c., the "spitting of blood" must be taken to mean a symptom of disease tending to shorten life, the mere fact being of no significance, as that may happen from the mere pulling a tooth. Yet the court were of the opinion that if a single instance of spitting of blood was the "result of the disease called spitting of blood," it ought to be stated. If he had "spit blood from his lungs, no matter in how small quantity, or even had spit blood from an ulcerated sore throat, he would be bound to state it;" and one of the learned judges, Pollock, C. B., went so far as to say that "one single act of spitting of blood" ought to have been mentioned, though he had just before said that the expression "spitting of blood" no doubt meant the *disorder* so called, whether proceeding from the lungs, the stomach, or any other part of the body, leaving it fairly to be inferred that he intended to go no further than his brethren in respect to the single act.¹ In *Fried v. Royal Insurance Company*, the question tried was whether the "spitting of blood" proceeded from the lungs or from the stomach, under a representation by the insured that he was not afflicted with spitting of blood or disease of the lungs.² The propriety of submitting the question in this form to the jury seems not to have been contested in either of the appellate courts, the Supreme Court,³ or the Court of Appeals.⁴ Fainting fits are

¹ *Geach v. Ingall*, 14 Mees. & Wels. 95.

² So stated in *Bliss on Insurance*, p. 159.

³ 47 Barb. (N. Y.) 127.

⁴ 2 Ins. L. J. 126.

not "epileptic or other fits," and are consistent with the truth of a representation that the applicant is not subject to "epileptic or other fits."¹

§ 299. **Habits — Intemperance — Opium-eating.** — A warranty that the insured is of sober and temperate habits means that at the time of insurance, and for such a reasonable time prior thereto as would allow of a man evincing a habit, the insured was a temperate man. The question is not whether he was intemperate to such a degree as to injure his health. The insurers have a right to protect themselves by guarding against the risks of pernicious habits; and if one who stipulates for habitual sobriety and temperance is an habitual drunkard, he loses his protection under such a warranty, though his health may be good and his constitution unimpaired.² And especially have the insurers a right to know that the insured had had *delirium tremens* within one year prior to the issuing the policy, and that during the year prior to that he had been attended by his physician on account of the effects of excessive drinking.³ In Scotland it is held that the habit of using opium, laudanum, or spirituous liquor to such an extent as to impair the health is one that ought to be disclosed. And a policy was held void for non-communication of this fact, the applicant having stated that he was in perfect health, and a negative answer by both the medical and other referees to the question whether "they knew any reason why an insurance on the life would be more than usually hazardous" having been given.⁴ If the agreement is that at the time of the insurance the insured is a man of sober and temperate habits, and that is not the fact, it is no answer to say that the habits were not such as to injure the health.⁵ Addicted to the excessive use of intoxicating liquor means habitual excessive use, not occasional.⁶ Habits of intemperance acquired subsequent to the insurance, even though the cause of death, will not avoid the policy, unless

¹ *Shilling v. Accidental Death Ins. Co.*, 1 F. & F. 116.

² *Southcombe v. Merriman*, Carr. & Marsh. 286.

³ *Hutton v. Waterloo Life Ass. Soc.*, 1 F. & F. 735.

⁴ *Forbes v. Ed. Life Ass. Co.*, 10 Ct. of Sess. Cas. (Scotch) 1st ser. 451.

⁵ *Southcombe v. Merriman et als.*, 1 Carr. & Marsh. 286.

⁶ *Mowry v. Home Ins. Co.*, 1 Bigelow, Life and Ac. Ins. Cas. 698, to be reported in 9 R. I.

expressly so stipulated.¹ And that the insured died from an injury received while intoxicated is immaterial.² And a man cannot truly be said always to have been sober and temperate, who, though usually of sober and temperate habits, occasionally indulges in drunken debauches, which sometimes terminate in *delirium tremens*.³

§ 300. Same Subject — Distinction between Answer to specific Question and a Want of Fulness in Answer to a general Question. — The same general questions as to health and habits came before the court in a very recent case, where some of the questions were somewhat different in form from any of those we have been considering, one, especially, calling for an answer whether the habits of the insured were uniformly and strictly sober and temperate.⁴ The case was tried before Dillon and Treat, JJ., and seems to have been carefully considered. And in charging the jury the court held the following language: —

“The main defence upon the trial has been rested upon alleged misrepresentations by the assured in the application, respecting his health and his habits as to the use of alcoholic drinks.

“In the application the following questions were asked of Henry, and answered by him: 6. ‘Is your health good (and, as far as you know), free from any symptoms of disease?’ Answer: ‘Yes.’ 9. ‘Are your habits uniformly and strictly sober and temperate?’ Answer: ‘Yes.’ 10 (a). ‘Have you ever been addicted to the excessive or intemperate use of any alcoholic stimulant or opium?’ Answer: ‘No.’ 10 (b). ‘Do you use habitually intoxicating drinks as a beverage?’ Answer: ‘No.’

“By the terms of the contract between these parties, these

¹ Reichard v. Manhattan Life Ins. Co., 31 Mo. 518; Horton v. Equitable Life Ass. Soc. of the United States, C. C. P. (N. Y.) 1870; s. c. 2 Bigelow, Life and Ac. Ins. Rep. 2, 108.

² Ibid.

³ Mutual Benefit Life Ins. Co. v. Holterhoff, 2 Cincinnati Superior Ct. Rep. 379.

⁴ Swick v. Home Life Ins. Co., 1 U. S. Circuit Ct. for the Eastern District of Missouri, March T. 1873, 2 Ins. L. J. 415.

answers are warranted to be true ; and it is agreed in the policy that if these answers are untrue or deceptive in any respect, the policy shall be void and of no effect. The parties have the right thus to agree, and are bound by their agreement, and hence the importance of understanding what the questions asked were, and the answers given thereto. This is the more important, because if the answers given are untrue, the policy is avoided, although there are no intentional or fraudulent misstatements, and although the party's habits as to intoxicating drinks did not in fact cause or even accelerate his death. We remark to you, first, that the questions as to health and habits in respect to intoxicating drinks will be taken to mean what the words employed by those questions usually and commonly mean. They are not words of art, but words of every-day meaning, and this is a contract not between professional men or lawyers, but a contract that these companies profess to make with the world, and when they ask a man if his health is good, there is no mystery in the question. If you find from the evidence that at the date of the application Henry's health was not good, or if Henry knew of any symptom of disease which he did not disclose, then there can be no recovery on the policy. If you find the fact to be as the company contends it was, that Henry's general health was at the time impaired by exposure, or from the use of intoxicating liquors, or from any other cause, there can be no recovery on the policy. But if it was shown to the company, or its agent taking the risk, that the assured had, as certified by the family physician to the company, been sick a few days before, and if this was a mere temporary illness which was over at the time, and was disregarded by the company, or its agent taking the risk, as not being within the purview of the question asked of the assured in this respect, the policy would not be thereby avoided.

"Now as to the question respecting intoxicating liquors. These relate to the habits of the party. The applicant stated that he had never been addicted to the excessive or intemperate use of alcoholic stimulants. This is not a statement that he had never been addicted to the use of intoxicating liquors at all, but a statement that he had never been addicted to the

excessive and intemperate use of them, and it is untrue if Henry had, and only in case he had, been addicted to the excessive or intemperate use of alcoholic stimulants.

"The application, in answer to other questions, stated that his habits were uniformly and strictly sober and temperate, and that he did not habitually use intoxicating drinks as a beverage. These questions and answers you will perceive relate to the habits of the party in that respect. If the company did not intend to insure any person who used intoxicating liquors at all, it would be very easy to ask such a question. But they have not done so. The occasional use of intoxicating liquors by the applicant would not make these answers untrue; nor would they be rendered untrue by any use of intoxicating drinks which did not make his habits those of a man not uniformly and strictly sober and temperate, or which did not amount to habitual use of such drinks as a beverage.

"It is your province to decide from the evidence whether the assured was or was not, at the time the application was made, a man whose habits were uniformly and strictly sober and temperate, or whether he did or did not habitually use intoxicating stimulants as a beverage; and if you find his answer to either question to be untrue, there can be no recovery on this policy, although, as above remarked, he did not intentionally make false answers, and although those habits did not in fact cause, hasten, or contribute to the death. We have been asked by the defendant to instruct you that if the answers as to the health and habits are not *full*, correct, and true, the plaintiff cannot recover, even though the failure to make full answers was unintentional. The application referred to and made part of the policy, contains the provision: 'The undersigned does hereby covenant . . . that the preceding answers and this declaration shall be the basis of the policy; that the same are *warranted* to be full, correct, and true, and that no circumstance is concealed, withheld, or unmentioned in relation to the past or present state of health, habits of life, or condition of the said party whose life is to be assured, which may render an insurance on his life more than usually hazardous, or which may affect unfavorably his prospects of life;' and that 'if the

foregoing answers and statements be not in all respects full, true, and correct, the policy shall be void.' The policy repeats or adopts this provision. Now a distinction is to be taken, we think, between untruthful answers to specific questions and the mere failure to make full answers. Such failure, under these provisions, to defeat the policy must relate to some circumstance which might render an insurance on his life more than usually hazardous, or which might affect unfavorably his prospects of life; while an untruthful or incorrect answer to the specific questions asked renders the policy absolutely void, though made in relation to a matter not material to the risk."

§ 301. **Death by Intemperance — Proximate Cause.** — If a policy is by its provisions to be void when the insured shall die by reason of intemperance in the use of intoxicating liquor, it must appear that intemperance is the paramount and proximate cause of death. It is not enough that the insured may have been addicted to habits of intemperance, indulged in for a considerable period prior to his death. Such habits doubtless have a tendency to shorten life, but if on this ground payment of a loss may be resisted, no insurance, though knowingly taken, upon the life of an intemperate man would be of any value. To warrant such a defence it should appear that intemperance was the cause of death, so recently prior to the death, and having such an obvious connection with it, that the death may be clearly traceable to it, and fairly be said to have been produced by it. If intemperance is only a contributory cause, and not the sole, or at least paramount cause of death, the defence cannot avail, as in actions for negligence, the plaintiff cannot recover unless it be shown that the negligence of the party to be charged is something more than a contributory cause of the injury. Neither intemperance combined with other causes, nor intemperance as a secondary, remote, and predisposing cause, will avoid the policy.¹

¹ *Miller v. Mutual Benefit Life Ins. Co.*, 31 Iowa, 216. Some observations fell from Daly, J., in *Horton v. The Equitable Life Assurance Company of the United States* (N. Y. Ct. Com. Pleas, 1870, *ubi supra*), not entirely consistent with the doctrine stated in the text. But they were *obiter*, and perhaps not well considered. The point decided was that on an issue of the truth of a statement, the truth of which was warranted, that at the time the insurance

§ 302. **Death from Intemperance.** — In another action against the same company,¹ substantially the same question again arose. The policy provided that the insurers should not be liable if the insured should “die by reason of intemperance from the use of intoxicating liquors.” That the insured so died was set up in defence; and there was evidence to establish the defence, and that the insured had *delirium tremens* or *mania a potu*, caused by such intemperance, and that such disease is often fatal. It was also in evidence that morphine, amongst other medicines, was administered in large quantities to the insured by the physician called to take care of him, as a remedy. The plaintiff claimed that the treatment was improper, and that if the plaintiff had *delirium tremens*, the death of the insured resulted directly and immediately from the excessive amount of opium administered, and not from the disease. The defendants requested the court to rule that “if the assured, by intemperance caused by the use of intoxicating liquors, brought upon himself a disease, fatal in its nature, and a physician was called in who, in good faith and with intent to cure, administered medicines which in fact contributed to, or even caused the death of, the insured,” he could not recover. This instruction was refused, but the court did instruct the jury as follows: “The real question in this case is, whether intemperance from the use of intoxicating liquors was the cause of death. If the disease from which the insured was suffering was *delirium tremens* or *mania a potu*, or other disease resulting from intemperance from the use of intoxicating liquors, and that disease, though not necessarily mortal, yet from want of helpful application, or neglect of proper care or treatment, produced exhaustion or fever, and consequent death, the death would properly be considered as resulting

was effected the insured had never been addicted to habits of intemperance, the fact that the death occurred from an injury received while intoxicated, and because of the intoxication, was irrelevant, a decision which was no doubt correct. See *Watson v. Mainwaring*, 4 Taunt. 763.

¹ *Ranney v. Mut. Benefit Life Ins. Co.*, tried in the Circuit Court of the United States for the First Judicial District (Mass.), before Shepley, J., March, 1873, and on exceptions to the rulings of the court carried to the Supreme Court of the United States.

from the intemperance, even if the disease were not so mortal in itself, but that with good care and under favorable circumstances the insured might have recovered; yet if it became the cause of death by reason of the most efficacious mode of treatment not having been adopted, then the plaintiff would not be entitled to recover. If the death of the assured was caused by any drug administered to him in the course of medical practice for the purpose of cure, in sufficient quantity to produce death, and death was the effect of the drug and not of the disease, then, in such case, the death could not properly be considered as resulting from the intemperance in the use of intoxicating liquors, and the plaintiff upon that branch of the case would be entitled to recover." And the court further instructed the jury "that they were to consider whether the insured caused his own death by the use of intoxicating drinks, or whether the physician caused the death by the use of narcotic drugs; whether the death resulted from that alone, or whether the man was in a condition in which they failed to relieve him from the disease, and left the disease to cause the death itself; or whether it was of itself the active and immediate cause of the death, and he would have recovered but for that, is a question of fact for your determination."

§ 303. **Materiality of Statements at the Medical Examination — Evidence.** — In a strongly contested case in New York, the question arose whether the examining physician might testify whether the statement made by the applicant, during that application, that he was a man of means, influenced his judgment upon the general question whether the applicant was afflicted with any disease tending to shorten life, and whether the life was one which he could recommend. This evidence was admitted, upon the ground that such a statement was material, and might properly influence the mind of the medical examiner, for the same reason that any statements, though not strictly relating to the risk, if they are calculated to determine the question in the mind of the insurer whether he will assume the risk or not, are material, and, if false, avoid the policy. The social relations, the pecuniary circumstances, the fact that others skilled in insurance had taken the same

risk, and many other facts not having a direct bearing upon the risk itself, may, and doubtless often do, influence the judgment in determining whether to assume the risk.¹ The object of a physical examination of a person proposing to insure his life by a competent physician, it was observed by the court, is to ascertain whether he is laboring under, or is subject to, any disease or defect which may have the effect to shorten life. The inquiry involves an examination not only into the present state of the various organs and functions of the body, but into the tendency of these organs and functions to take on diseases as affected by habits of mind as well as of body, temperament, tendency to disease from hereditary causes, and the occupation and condition in life of the subject. Of two persons of the same age and present bodily health, the one may present a risk entirely safe, the other unsafe. It is impossible to fix limits to the subject into which it is not only proper, but necessary, for an examining physician to inquire, in order to enable him to arrive at a conclusion upon which he can properly advise the acceptance or rejection. The fact that the applicant declares himself to be a man of means may affect his judgment in such case, and, if so, an answer to that question is material. The physician may therefore be properly inquired of if that statement affected his judgment in recommending the risk.²

§ 304. **Family Physician — Medical Attendant.** — A “family physician” is the physician who usually attends and is consulted by the members of a family in the capacity of physician.³ And where the usual medical attendant is inquired for, the one who has been accustomed to attend, and not the one who has occasionally attended, should be mentioned,⁴ although the usual attendant be a quack.⁵ But when the usual medical

¹ *Sibbald v. Hill*, 2 Dow, 263; *Anderson v. Fitzgerald*, 4 H. of Lds. Cas. 484.

² *Valton v. National Loan Fund Life Ass. Soc.*, 1 Keyes (N. Y.), 21, reversing s. c. 17 Abb. Pr. Rep. (N. Y.) 268.

³ *Price v. Phoenix Mut. Life Ins. Co.*, Sup. Ct. Minnesota, 2 Ins. L. J. 223.

⁴ *Huckman v. Fernie*, 3 Mees. & Wels. 505; *Monk v. Union Life Ins. Co.*, 6 Robt. (N. Y. Superior Ct.) 455.

⁵ *Everett v. Desborough*, 5 Bing. 503.

attendant has not been called in for several years, and another is in attendance at the time the policy is applied for, it is for the jury to say, if, in answering the question, "Who is your medical attendant?" he gives the name of the usual attendant, and does not give the name of his attendant for the time being, the answer is true.¹ The object of reference to the medical attendant is to obtain the best information as to the quality of the life proposed, and it would seem that whatever be the form of the inquiry, the answer should be such as the applicant has reason to believe will best accomplish that object. Thus, in *Hutton v. Waterloo Life Assurance Society*,² where special inquiry was made as to sobriety and temperance, and also for the name and address of the medical attendant of the insured, and the answer affirmed habits of sobriety and temperance, and gave the name of a casual medical attendant, but did not give the name of a physician who had then recently attended him, while under *delirium tremens*, it was held to have been the duty of the applicant to have disclosed the name of the physician who attended him for *delirium tremens*. In *Forbes v. Edinburgh Life Assurance Company*,³ the insured was asked to refer to a "medical man" (if possible his usual medical attendant) to ascertain the present and general health of the party to be assured, and gave the name of a physician who could give little information on this point, but omitted to mention the name of one who might have been useful in that particular, and though the case was decided upon another point, the Lord President expressed himself very strongly against this as a fraud which would vitiate the policy. And when one is shown to have been the usual medical attendant, the relation will be presumed to be continued, unless a change be shown, within reasonable limits, so that an answer by an applicant that he has no usual medical attendant, when in fact he has had one who was in attendance within a month prior to making the application, — there being no evidence of discharge, — is false, and avoids the policy.⁴ But a former attending physi-

¹ *Maynard v. Rhode*, 1 C. & B. 360.

² 1 F. & F. 735.

³ 10 Ct. of Sess. Cas. (Scotch) 451.

⁴ *Monk v. Union Mut. Life Ins. Co.*, 6 Robt. (N. Y. Superior Ct.) 455.

cian, who has retired from practice, and has recently attended in a single instance, gratuitously and as a friend in an emergency, pending the arrival of another physician who had been sent for, is not, as matter of law, an attending physician. At most, it would be a question for the jury.¹ In the case in Minnesota, just cited, much discussion was had upon the meaning of the phrase "family physician," the majority of the court arriving at the conclusion above given, and for the following reasons, stated by Berry, J. : —

"The phrase, 'family physician,' is in common use, and has not, so far as we are aware, any technical signification. As used in this instance, and for the purposes of the testimony appearing in this case, the chief justice and myself are of opinion that it may be sufficiently defined as signifying the physician who usually attends, and is consulted by the members of a family in the capacity of a physician.

"We employ the word 'usually,' both because we do not deem it necessary to constitute a person a family physician, as the phrase is used in this instance, that he should invariably attend and be consulted by the members of a family in the capacity of physician, and because we do not deem it necessary that he should attend and be consulted as such physician by each and all of the members of a family. For instance, the testimony in this case shows that at the time when the application for insurance was made the family of Richard Price consisted of himself, his wife, and two or three children. We think that a person who usually attended, and was consulted by the wife and children of Richard Price as a physician, would be the family physician of Richard Price in the meaning of the above twenty-fifth interrogatory, although he did not usually attend on, and was not usually consulted as a physician by Richard Price himself."

But there was a dissenting opinion, which we give, as affording views which may, not improbably, prove in the end the most satisfactory. That opinion was by McMillan, J., and was as follows : —

"One ground of defence set up is, that at the time the appli-

¹ Gibson v. American Mut. Life Ins. Co., 37 N. Y. 580.

cation was made, and the policy executed, Richard Price, the deceased, had a family physician. No other issue is taken upon this interrogatory. It does not appear that the term 'family physician' has any technical signification; it is, therefore, for the court to determine the meaning of the phrase, 'family physician of the party.' As here used, the purpose of the interrogatory was to obtain the name and residence of the medical attendant best able to give an account of the physical condition, at the times referred to, of the person whose life was assured.¹ This intention would be best effected by obtaining a reference to the physician who was the medical adviser of such person. The interrogatory, it seems to me, was made to embrace the two questions contained in it, and put in the alternative, in order that a true affirmative answer to either would elicit the address of the physician who had charge of the assured as his medical adviser. In both questions the inquiry is for the physician of *the party*; yet if the phrase, 'family physician of the party,' does not necessarily include the person assured, a true answer in many cases may be given to the first question embraced in the interrogatory, without disclosing the name of the physician of the assured; for instance, the person whose life is assured may have one person as his individual physician, and a different person as the physician of all the rest of his family; yet if the construction given by my brethren to the phrase, 'family physician of the party,' be correct, it seems to me he might, in answer to the inquiry for his family physician, truthfully give the name of the physician attending the other members of his family, and without the name of his personal physician; for, according to this construction, the terms of the question call for nothing more. It may be that such answer would be a true answer to the entire interrogatory, but that is not the question before us; the only point for us to determine is, whether Price's answer is false in this, that he had a family physician at the time, and answered that he had none.

"I am unable, therefore, to concur with my brethren in the construction they give to the phrase, 'family physician of the

¹ Bliss on Life Ins. 171.

party.' I think the phrase, as used in this instance, means the physician who usually attends and is consulted by all or most of the members of the family of the person whose life is assured, and that the person thus assured, if he has medical attendance, must be one of the members attended by such physician."

§ 305. **Age — Residence — Relationship.** — A misrepresentation or an equivocation as to the age is material, — although a fact not entering into the risk, — in that the age is the basis upon which the premium is based, that being at a greater or less rate as the age is more or less advanced.¹ "It is trifling," said Pollock, C. B., in the case last cited, "to say that that is a true answer which requires something to be added to make it true." And it has been held that where the applicant truly answered the question as to residence, but failed to disclose the fact that she was in prison at the place of residence, it might be material; and it was for the jury to say whether it was or not, and this although there was nothing in the policy which could be construed as requiring the imprisonment to be stated. And in the Superior Court at Buffalo it was held, where the statements were warranties, that a representation that the person for whose benefit the policy was taken out was the wife of the applicant, when in fact she was not, was untrue, and worked a forfeiture.²

§ 306. **Occupation.** — An untrue statement in the application, which is made a part of the policy, as to the occupation at the time the application is made, will avoid the policy. What is necessary to be stated is the occupation in which the insured is engaged at the time, and not the occupation in which he may have been generally engaged before that time. If one who is in fact a farmer, and has followed that business from his youth up, is occupied in any other pursuits, as a business, at the time he seeks insurance, the special occupation should be stated, and not the general one. The existing status

¹ *Cazenove v. Brit. Eq. Ass. Co.*, 6 C. B. n. s. 437; *Murphy v. Harris, Batty (Irish)*, 206; *Wray v. Manchester Provident Ass. Co.*, *Nisi Prius*, cited from the London Times of Mar. 1871, by Bliss, Ins. 165.

² *Stannard v. Am. Pop. Life Ins. Co.*, cited in Bliss, Ins. 164.

of the applicant, in this particular, is that about which the insurers are interested to know, and substantial untruth relative thereto is fatal.¹ In England, it has been held that a representation that the applicant was an "esquire" is sufficient, if true, although he was then engaged in business as an ironmonger. Such a statement, said Hill, J., "is not untrue, but simply imperfect. Suppose the applicant had been a wine-merchant and a banker, and had put down only that he was a banker; could it have been said that that was an untrue statement? I think not." The majority of the judges in the Queen's Bench thought the word designated an occupation, and, being true as far as it went, was sufficient. But Cockburn, C. J., thought the answer tantamount to saying that he had no occupation, and was untrue.² But the judgment was affirmed in the Exchequer Chamber.³ "It is said," said Williams, J., "the statement of the plaintiff that he was an esquire was an untrue statement, because it was a suppression of the truth; the truth being that he was also an ironmonger. But there is no foundation for the argument. The plaintiff said, in effect, I am in that position in life in which people are usually addressed as esquires. A man who is in such a position is no more deserving of the imputation of telling an untruth by calling himself an esquire, without adding his trade, than a peer of the realm would be who should describe himself as such, and not also state that he was a brewer, banker, or ironmaster, as the case might be." But the position of the defendant's counsel, that "in withholding the fact that he was an ironmonger, he was guilty of a *suppressio veri*, tantamount to a positive statement that he had no occupation," does not seem to be satisfactorily answered. The language of Williams, J., shows that esquire was a mere title of courtesy indicative of social position, and if this case is law, then a man who is actually engaged in the business of manufacturing nitro-glycerine or gunpowder, if he happen to be a peer, need only state the latter fact. Yet a peer would know, presumably,

¹ Hartman v. Keystone Ins. Co., 21 Penn. St. 466.

² Perrins v. Mar. and Gen. Tr. Ins. Co., 2 E. & E. 317.

³ 2 E. & E. 324.

that the fact that he was a peer was of little or no moment to the insurers, while the fact that he was engaged in a hazardous business was of the greatest moment. It would seem that if a man have two or more occupations, if he be not required to state all, he ought at least to state that one which he has reason to believe the insurers are most interested to know, and whether he had done this in the particular case would be for the jury to say. Perhaps, as was said by Black, J., in the case from Pennsylvania, above cited, where the warranty was that the statement was in *all respects* true, such warranty ought not to be held to include "inaccuracies which are not material." But substantial truth certainly is required both by the conditions of the contract and by the good faith which ought to inspire the answers to such questions.¹ In *Huguenin v. Bailey*² it was held that where the insured had truly stated her residence at a given place, when in fact she was in jail at that place, it ought to be submitted to the jury whether this was a material "reservation" or not. If the statement of present occupation be true, however, any subsequent change will not avoid the policy if not so stipulated.³

¹ And see *Smith v. Ætna Life Ins. Co.*, Ct. of App. N. Y. Jan. 1873, 2 Ins. L. J. 116.

² 6 Taunt. 186.

³ *Provident Life Ins. Co. of Chicago v. Fennell*, 49 Ill. 180.

CHAPTER XIII.

OF THE SPECIAL PROVISIONS OF THE CONTRACT (*continued*).

§ 307. **Suicide — Death by one's own Hands — Taking one's own Life.** — Prominent among the causes which insurance companies have provided shall exempt them from liability under life policies, is death by suicide ; or, as it is sometimes expressed, if the insured “ shall die by his own hands,” or “ take his own life.” It is prominent also in the difficulty which has been found in determining the meaning of the provision, and the learning and ability which has been displayed in the attempt. The courts seem to delight in its discussion. There seems to be about this question a fascination which the judicial mind is unable to resist ; and whenever the question presents itself, whether in the courts of Westminster Hall, or those of our western wilderness, it has given rise to so many and such interesting opinions as to have secured for the student, if not relief from his perplexing doubts, at all events recreation and instruction while he is devoting himself diligently to inquiries which he hopes may result in such relief. Upon the question of voluntary suicide intentionally committed by a sane man in the possession of his faculties, knowing how to adapt means to ends, and conscious of the immorality of the act, there is not, as indeed there could not well be, any difference of opinion, and all authorities agree that such a suicide is within the exemption. And all the authorities likewise agree that an accidental death, as by taking poison by mistake, or shooting one's self with a pistol, supposing it not to be loaded ; or falling from a building, or death happening in any way by the unintended act of the party dying, is not within the exemption. But whether suicide by an insane man is also within the exemption has been the question in dispute, and upon this two prominent and different doctrines have been maintained. On

the one hand, it is maintained that if the act be voluntarily done in pursuance of an intelligent purpose, and intentionally and intelligently carried out by the proper adaptation of means to ends, it is suicide on the part of the insured, or death by his own hands, although insanity exist, to such an extent that he may not be able to appreciate the moral qualities of the act. On the other hand, it is maintained with equal vigor, that however intelligently the act may be done, if at the time the will be overpowered by an uncontrollable impulse, or the party be unable to appreciate the moral character of the act, it is not within the meaning of the provision.

§ 308. And hereupon there has been hitherto, and still is, an irreconcilable conflict of opinion, both among different courts and among the different judges of the same court. And while at one time it seemed that the former opinion was likely to become the prevailing one, both from the character and from the number of the courts and judges who adopted it, at this moment it must be admitted that there is little reason upon such grounds to look for such a result, and the question is apparently as far from being settled as it was when it was first broached. We have therefore no alternative but to give its history, and by so doing we shall best show the present state of the question. And as the earlier English cases will be found to be stated with fulness in the American cases which we shall have occasion to cite at some length, no further statement of those cases will be necessary. As early as eighteen hundred and forty-three the question came under discussion in the courts of New York in the case of *Breasted v. Farmers' Loan and Trust Company*,¹ which was a case of self-destruction by drowning, where the defence was suicide, to which there was a reply that the insured was insane at the time, and this reply was demurred to, of course admitting the insanity. The policy provided against liability if the assured should die by his own hand. The plaintiffs had judgment upon the demurrer for the following reasons, by Nelson, C. J. :—

“The question arising upon the demurrer is, whether Comfort's self-destruction in a fit of insanity can be deemed a

¹ 4 Hill (N. Y.), 73.

death *by his own hand*, within the meaning of the policy. I am of opinion that it cannot. Since the argument of the case, I have examined many precedents of life policies used by the different insurance companies, and am entirely satisfied that the words in the policy in question import a *death by suicide*. Provisos declaring the policy to be void in case the insured *commit suicide*, or *die by his own hand*, are used indiscriminately by different insurance companies as expressing the same idea; and so they are evidently understood by writers upon this branch of the law. . . .

“The connection in which the words stand in the policy would seem to indicate that they were intended to express a criminal act of self-destruction, as they are found in conjunction with the provision relating to the termination of the life of the insured in a duel, or by his execution as a criminal. This association may well characterize and aid in determining the somewhat indefinite and equivocal import of the phrase. Speaking legally, also (and the policy should be subjected to this test), self-destruction by a fellow-being, bereft of reason, can with no more propriety be ascribed to the act of his *own hand*, than the deadly instrument that may have been used for the purpose. The drowning of Comfort was no more *his act*, in the sense of the law, than if he had been impelled by irresistible physical power; nor is there any greater reason for exempting the company from the risk assumed in the policy, than if his death had been occasioned by such means. Construing these words, therefore, according to their true, and, as I apprehend, universally received meaning among insurance offices, there can be no doubt that the termination of Comfort’s life was not within the saving clause of the policy. Suicide involves the deliberate termination of one’s existence while in the possession and enjoyment of his mental faculties. Self-slaughter by an insane man or a lunatic is not an act of suicide within the meaning of the law.¹ I am of opinion, therefore, that the plaintiffs are entitled to judgment on the demurrer.”

Ten years later this judgment was affirmed in the New

¹ 4 Bl. Comm. 189; 1 Hale’s P. C. 411, 412.

York Court of Appeals,¹ the judges voting five for affirmation and three for reversal. In the mean time the case had been tried by referees upon the general issue contained in the pleadings, who found specially that deceased threw himself into the river, "while insane, for the purpose of drowning himself, not being mentally capable of distinguishing between right and wrong." The opinion of the majority was by Willard, J. :—

"The question raised by the decision of the referees is substantially the same as that decided by the Supreme Court on the demurrer. It will be unnecessary, therefore, to give each a separate examination.

"It is material to determine, in the first place, what is meant by the term, *death by his own hand*, which is to avoid the policy. If the words are construed according to the *letter*, an accidental death caused by the instrumentality of the *hand* of the insured would fall within the exception. Thus, should the insured, by mistake, swallow poison, and thereby terminate his life, his representatives could not recover on the policy if the poison was conveyed to his mouth by *his own hand*. The same rule of construction applied to the words, *death by the hands of justice*, in the same connection, would take the case out of the exception, if the death was occasioned by strangulation by a *rope* instead of the *hands* of the minister of justice. But it is too plain for argument that the *literal* meaning is not the true meaning of either phrase. *Death by the hands of justice* is a well-known phrase, denoting an execution, either public or private, of a person convicted of crime, in any form allowed by law. The moral guilt of the party executed has nothing to do with the definition. Socrates, though he took the poison from his own hand, died by the hands of justice, in this sense of the term. It would be an abuse of language to charge him with an act of intentional self-destruction. The martyrs who perished at the stake, in like manner 'died by the hands of justice.'

"In popular language, the term *death by his own hand*, means the same as *suicide*, or *felo de se*. The first two, indeed, are not technical terms, and *may* be used in a sense

¹ 8 N. Y. 299.

excluding the idea of criminality. The connection in which they are used in this policy indicates that the phrase, *death by his own hand*, meant an act of criminal self-destruction. Provisos declaring the policy to be void in case the assured *commit suicide*, or *die by his own hand*, are used indiscriminately as expressing the same idea. In the note to *Borradaile v. Hunter*¹ are given the forms of the proviso, used by seventeen of the principal London insurance companies. In eight of them the exception is of a death *by suicide*, and in nine of a *death by the assured's own hands*. In two, separate provision is made in case of a death by suicide not *felo de se*, and in two others in case of a death *by his own hands*, not *felo de se*. It is obvious, therefore, that the phrase, death by *his own hand* and death by *suicide*, mean the same thing, and that both, unless qualified by some other expressions, import a criminal act of self-destruction. The connection in which they stand in this policy favors this construction. The first four exceptions in the policy are of acts innocent in themselves, three of which become inoperative if the defendants give their consent and have it indorsed on the policy. Then follow the last four exceptions, viz., *if he shall die by his own hand, or in consequence of a duel, or by the hands of justice, or in the known violation of any law, &c.* By the acknowledged rule of construction, *noscitur a sociis*, the first member of the sentence, if there be any doubt in its meaning, should be controlled by the other members, which are entirely unequivocal, and should be construed to mean a felonious killing of himself.² It is a note laid down by Lord Bacon that, *copulatio verborum indicat acceptionem in eodem sensu*; the coupling of words together shows that they are to be understood in the same sense. And when the meaning of any particular word is doubtful or obscure, or when the expression, taken singly, is inoperative, the intention of the parties using it may frequently be ascertained and carried into effect by looking at the adjoining words, or at expressions occurring in other parts of the same instrument, for *quæ non valeant singula juncta jurant*.³

¹ 5 Man. & Gr. 648.

² Broome's Maxims, 293, 450.

³ Bacon's Works, vol. iv. p. 26; 2 Buls. Broome's Maxims, 293.

Besides, the words in this case are those of the insurer, and if susceptible of two meanings, should be taken most strongly against him. It was not contended on the part of the defendant that the policy would be avoided by a mere *accidental* destruction of life by the party himself. It was urged that it would be, if the act was *done intentionally*, although under circumstances which would exempt the party from all moral culpability. It was insisted that the expression must be taken to mean a death *by his own act*. It seems to me that this is a yielding of the whole question. An insane man, incapable of discerning between right and wrong, can form no intention. His acts are not the result of thought or reason, and no more the subject of punishment than those which are produced by *accident*. The acts of a madman, which are the offspring of the disease, subject him to no criminal responsibility. If the insured, while engaged in his trade as a house-joiner, had accidentally fallen through an opening in the chamber of a house he was constructing, and lost his life, the argument concedes that the insurer would have been liable. The reason is that the mind did not concur with the act. How can this differ in principle from a death in a fit of insanity, when the party had no mind to concur in or oppose the act?

“It must occur to every prudent man seeking to make provision for his family by an insurance on his life, that insanity is one of the diseases which may terminate his being. It is said the defendants did not insure the continuance of the intestate’s reason. Nor did they in terms insure him against the small-pox or scarlet-fever; but had he died of either disease, no doubt the defendants would have been liable. They insured the continuance of his life. What difference can it make to them or to him, whether it is terminated by the ordinary course of a disease in his bed, or whether in a fit of delirium he ends it himself? In each case the death is occasioned by means within the meaning of the policy, if the exception contemplates, as I think it does, the destruction of life by the intestate while a rational agent, responsible for his acts.

“It is competent, no doubt, for the insurer so to frame his

policy as to exempt him from liability for a death occasioned in a fit of insanity. The parties have not done so in the present case.

“It is urged that because a person *non compos mentis* is liable *civiliter*, for torts committed while in a state of insanity, therefore insanity has no effect to qualify this exception in the policy. That conclusion is not a legitimate deduction from the premises. A rational man is liable *civiliter*, for an injury occasioned by an accident, unless it be an inevitable one, and yet no one pretends that the insurer is not liable for a death by accident, whether inevitable or not. Indeed, the liability for death by accident was conceded on the argument. A death by accident, and a death by the party’s own hand, when deprived of reason, stand on principle in the same category. In both cases the act is done without a controlling mind. If the insurer is liable in the one case, he should be in the other.

“If the insured was compelled by duress to take his own life, it will hardly be contended that the insurers could avoid payment. In what consists the difference between the duress of man and duress of Heaven? Can a man be said to do an act prejudicial to the insured when he is compelled to do it by irresistible coercion? and can it make any difference whether this coercion come from the hand of man or the visitation of Providence?

“But it is urged that this is a civil action, and the contract of insurance a civil contract. Be it so. A person so destitute of reason as not to know the consequences of his acts can make no valid contract. Whether the incompetency be the result of disease or of intoxication, his contracts made while in that condition are void.¹ If the party could do no act to bind himself, he certainly could do none to bind the insurer. If he could not make a bond, he could not make a release. If he could not make a will, he could not revoke one.

“The liability of a lunatic for necessities rests upon the ground that the law will raise a contract by implication on

¹ *Basset v. Buxton*, 2 Aikens, Vt. Rep. 167, approved by Chancellor Walworth in *Prentice v. Achorn*, 2 Paige, 31, and by Chancellor Kent in 2 Comm. 451; *Smith’s Law of Contracts*, 329, 333, and notes.

the part of the lunatic, in favor of the party who has supplied them in good faith, and therefore does not affect the present question.¹ The cases on this head are analogous to that of an infant.² The law, to prevent a failure of justice, will *imply a promise* by a party incapable of making a contract; but it will never imply that a party incapable of distinguishing between right and wrong was guilty of a fraud.

“At the time this case was decided by the Supreme Court on the demurrer, there had been no case, either in this country or in England, in which the same question had arisen. The case of *Borradaile v. Hunter*,³ decided by the English Common Pleas in 1843, has since been reported. That action was brought by the executor of the insured upon a life policy containing a proviso that in case the assured should die by his own hands, or by the hands of justice, or in consequence of a duel, the policy should be void. The assured threw himself into the Thames and was drowned. Upon an issue, whether the assured died by his own hands, the jury found that he *voluntarily* threw himself into the water, *knowing* at the time that he should thereby destroy his life, and intending thereby to do so; but at the time of committing the act he was not capable of judging between right and wrong. It was held by a majority of the court, Tindal, C. J., dissenting, that the policy was avoided, as the proviso included all acts of *voluntary* self-destruction, and was not limited by the accompanying proviso to acts of felonious suicide. The three judges who formed the majority laid the main stress upon the fact that the jury found the act of self-destruction to be *voluntary*, that he knew when he threw himself into the river he should thereby destroy his life, and that he intended thereby to do so. The referees in the present case have not found that the intestate acted *voluntarily*, or that he *knew* the consequence of his act. They merely find that while insane, for the purpose of

¹ *Walworth v. Tubb*, 1 Younge & Coll. Ch. 171.

² See *Smith's Law of Contracts*, 325 *et seq.*, and notes, where the cases are collected and reviewed.

³ 5 Man. & Gr. 639.

drowning himself, he threw himself into the river, not being mentally capable of distinguishing between right and wrong. If *Borradaile v. Hunter* be an authority which we ought to follow, it differs so much from the case before us, that we are at liberty to decide it upon principle.

“After the case of *Borradaile v. Hunter*, the case of *Schwabe v. Clift* was tried at *Nisi Prius*, before Cresswell, J. It was upon a policy upon the life of the plaintiff’s intestate, containing the proviso that if the assured should ‘commit suicide or die by duelling or by the hands of justice,’ the policy should be void. The assured died from the effects of sulphuric acid taken by himself, but evidence was given tending to show that at the time he took the sulphuric acid he was in part of unsound mind. In his charge to the jury, the learned judge said that to bring the case within the exception, it must be made to appear that the deceased died by his own *voluntary* act; that at the time he committed the act he could distinguish between right and wrong, so as to be able to understand and appreciate the nature and quality of the act he was doing; and that, therefore, he was at that time a responsible being. The jury found for the plaintiff.”¹

§ 309. But upon the finding of the referees that the act was done purposely, the following dissenting opinion was delivered by Gardner, J. : —

“The referees in this case have found ‘that the assured, on the twenty-fifth day of June, 1839, threw himself into the Hudson River, from the steamboat *Eric*, while insane, *for the purpose* of drowning himself, not being mentally capable at the time of distinguishing between right and wrong.’ The question is whether this act avoided the life policy in question,

¹ 2 Car. & Kirwan, 134. This cause was afterwards brought into the Court of Exchequer Chamber on the bill of exceptions, and will be found in 3 Man. & Gr. 437, by the title of *Clift v. Schwabe*. That court, by a vote of four to two, ordered a new trial, holding that the direction was erroneous; for that the terms of the condition included all acts of *voluntary* self-destruction, and therefore, if A. voluntarily killed himself, it was immaterial whether he was or was not a responsible moral agent. The case is open to the same remark as *Borradaile v. Hunter*, *supra*. It turned upon the assumed fact that the act of suicide was *voluntary*, a fact not found by the referees in this case.

one condition of which is, that if the assured 'should die by his own hand,' the policy should be void.

"It is by the finding established that the assured cast himself into the river for the purpose of drowning himself. The act committed by him was therefore voluntary, and accompanied by so much intelligence as to enable the agent to contemplate a particular result, and adopt the means requisite to accomplish it. His object was self-destruction by drowning. For this purpose he cast himself into the river, and thereby effected it. If this was not 'dying by his own hand,' within the spirit and intent of this clause of the policy, it is difficult to attach any legal significance to such language.

"If, under the same circumstances, the assured had destroyed the property or assaulted the person of a citizen, he would have been civilly responsible for all the damages sustained by the latter.¹ Insanity, unless it suspended the power of volition, would be no justification; still less a want of moral perception to distinguish between right and wrong.

"I can perceive no reason why upon the same principle he should not be held responsible for a wilful breach of contract resulting from self-destruction, where it was premeditated, and accomplished by means usual and appropriate to effect his design. In *Bagster v. Earl of Portsmouth*,² it was held that a lunatic was capable of contracting for necessaries. 'Imbecility of mind,' says Abbott, C. J., 'may, or may not, be a defence in the case of an unexecuted contract.'

"These cases show that the assured, although insane, is a responsible agent for some purposes, and consequently, *a fortiori*, that he can be affected and bound by a condition which qualifies the liability of the insurers, and which, in terms, is made to depend upon an act to be performed by the former.

"In *Borradaile v. Hunter*,³ in a life policy containing the same proviso found in the one before us, the jury found that the insured 'voluntarily threw himself into the water, knowing at the time that he should thereby destroy his life, and

¹ *Weaver v. Ward*, Hob. 134; *Cross v. Andrews*, Cro. Eliz. 622.

² 3 Dowl. & Ry. 614.

³ 5 Man. & Gr. 639.

intending thereby to do so, but at the time of committing the act he was not capable of judging between right and wrong.'

"It was held that the policy was avoided. The proviso included all acts of self-destruction, and was not limited by the accompanying provisos to acts of felonious suicide. This decision was pronounced in 1843, and the case is not distinguishable from the one under consideration. The case cited was argued and decided as one of insanity, in which, however, the assured was capable of voluntary action. Erskine, J., remarked, 'that all the contract required was, that the act of self-destruction should be the voluntary and wilful act of a man having at the time sufficient power of mind to understand the physical nature and consequence of the act, and having the intention to choose his own death.'

"In that case, and in the present, the incapability of distinguishing between right and wrong was the measure of the insanity of the assured. Four years afterwards, *Clift v. Schwabe* was decided in the Exchequer Chamber,¹ upon a policy in which the word 'suicide' occurred in place of the phrase 'dying by his own hands.' The issue was upon the fact of suicide, and an exception to the charge of the judge; it was held that the terms of the condition included all acts of voluntary self-destruction, and if the insured voluntarily killed himself, it was immaterial whether he was or not a responsible moral agent.

"These cases are directly in point; that last mentioned is much stronger for the assured than the one now under consideration.

"When this case was before the Supreme Court on demurrer, the replication averred that when the assured drowned himself he was of *unsound mind, and wholly unconscious of the act*. This was admitted by the demurrer, and the question whether voluntary action can exist without some degree of consciousness, is very different from the one presented by the finding before us.

"I think the judgment of the Supreme Court should be reversed."

¹ 54 Eng. Com. L. 437; 3 Man. Gr. & Scott, 437.

§ 310. *Life Insurance — Suicide.* — The question next came before the Supreme Court of Massachusetts,¹ in 1862, and was very elaborately considered. The insured had cut his throat with a razor, and the plaintiffs, in answer to the objection that his death was by his own hands, offered to show that the death was caused during a state of insanity. But this was held inadmissible. The opinion was by Bigelow, C. J. : —

“There can be no doubt that the facts agreed by the parties concerning the mode in which the assured destroyed his own life bring this case within the strict letter of the proviso in the policy, by which it was stipulated that it should be void and of no effect if the assured should ‘die by his own hand.’ The single question, therefore, which we have to determine is, whether, on the well-settled principles applicable to the construction of contracts, we can so interpret the language of the policy as to add to the proviso words of qualification and limitation, by which the natural import of the terms used by the parties to express their meaning will be so modified and restricted that the case will be taken out of the proviso, and the policy be held valid and binding on the defendants. In other words, the inquiry is whether the proviso can be so read that the policy was to be void in case the assured should die by his own hand, he being sane when the suicide was committed. If these or equivalent words cannot be added to the proviso, or if it cannot be held that they are necessarily implied, then it must follow that the language used is to have its legitimate and ordinary signification, by which it is clear that the policy is void.

“In considering this question, we are relieved of one difficulty which has embarrassed the discussion of the same subject in other cases. If the proviso had excepted from the policy death by ‘suicide,’ it would have been open to the plaintiffs to contend that this word was to have a strict technical definition, as meaning in a legal sense an act of criminal self-destruction, to which is necessarily attached the moral responsibility of taking one’s life voluntarily, and in the full exercise of sound reason and discretion. But the language of

¹ *Dean v. American Life Ins. Co.*, 4 Allen (Mass.), 96.

the proviso is not necessarily limited by the mere force of its terms. The words used are of the most comprehensive character, and are sufficiently broad to include every act of self-destruction, however caused, without regard to the moral condition of the mind of the assured, or his legal responsibility for his acts.

“Applying, then, the first and leading rule by which the construction of contracts is regulated and governed, we are to inquire what is a reasonable interpretation of this clause according to the intent of the parties. It certainly is very difficult to maintain the proposition that, where parties reduce their contract to writing, and put their stipulations into clear and unambiguous language, they intended to agree to any thing different from that which is plainly expressed by the terms used. It is, however, to be assumed that every part of a contract is to be construed with reference to the subject-matter to which it relates, and with such limitations and qualifications of general words and phrases as properly arise and grow out of the nature of the agreement in which they are found. Giving full force and effect to this rule of interpretation, we are unable to see that there is any thing unreasonable or inconsistent with the general purpose which the parties had in view in making and accepting the policy, in a clause which excepts from the risks assumed thereby the death of the assured by his own hand, irrespective of the condition of his mind, as affecting his moral and legal responsibility at the time the act of self-destruction was consummated. Every insurer, in assuming a risk, imposes certain restrictions and conditions upon his liability. Nothing is more common than the insertion, in policies of insurance, of exceptions by which certain kinds or classes of hazards are taken out of the general risk, which the insurer is willing to incur. Especially is this true in regard to losses which may arise or grow out of an act of the party insured. Such exceptions are founded on the reasonable assumption that the hazard is increased when the insurance extends to the consequences which may flow from the acts of the person who is to receive a benefit to himself or confer one on others by the happening of a loss within the terms of the

policy. Where a party procures a policy on his life, payable to his wife and children, he contemplates that, in the event of his death, the sum insured will enure directly to their benefit. So far as a desire to provide in that contingency for the welfare and comfort of those dependent on him can operate on his mind, he is open to the temptation of a motive to accelerate a claim for a loss under the policy by an act of self-destruction. Against an increase of the risk arising from such a cause, it is one of the objects of the proviso in question to protect the insurers. Although the assured can derive no pecuniary advantage to himself by hastening his own death, he may have a motive to take his own life, and thus to create a claim under the policy, in order to confer a benefit on those who, in the event of his death, will be entitled to receive the sum insured on his life. Unless, then, we can say that such a motive cannot operate on a mind diseased, we cannot restrict the words of the proviso so as to except from the risk covered by the policy only the case of criminal suicide, where the assured was in a condition to be held legally and morally responsible for his acts. It certainly would be contrary to experience to affirm that an insane person cannot be influenced and governed in his actions by the ordinary motives which operate on the human mind. Doubtless there may be cases of delirium or raving madness where the body acts only from frenzy or blind impulse, as there are cases of idiocy or the decay of mental power, in which it acts only from the promptings of the lowest animal instincts. But in the great majority of cases where reason has lost its legitimate control, and the power of exercising a sound and healthy volition is lost, the mind still retains sufficient power to supply motives and exert a direct and essential control over the actions. In such cases, the effect of the disease often is to give undue prominence to surrounding circumstances and events, and, by exaggerating their immediate effects or future consequences, to furnish incitement to acts of violence and folly. A person may be insane, entirely incapable of distinguishing between right and wrong, and without any just sense of moral responsibility, and yet retain sufficient powers of mind and reason to act with premeditation, to under-

stand and contemplate the nature and consequences of his own conduct, and to intend the results which his acts are calculated to produce. Insanity does not necessarily operate to deprive its subjects of their hopes and fears, or the other mental emotions which agitate and influence the minds of persons in the full possession of their faculties.

“On the contrary, its effect often is to stimulate certain powers to extraordinary and unhealthy action, and thus to overwhelm and destroy the due influence and control of the reason and judgment. Take an illustration. A man may labor under the insane delusion that he is coming to want, and that those who look to him for support will be subjected to the ills of extreme poverty. The natural effect of this species of insanity is to create great mental depression, under the influence of which the sufferer, with a view to avoid the evils and distress which he imagines to be impending over himself and those who are dependent upon him for support, is impelled to destroy his own life. In such a case, suicide is the wilful and voluntary act of a person who understands its nature, and intends by it to accomplish the result of self-destruction. He may have acted from an insane impulse, which prevented him from appreciating the moral consequences of suicide; but, nevertheless, he may have fully comprehended the physical effect of the means which he used to take his own life, and the consequences which might ensue to others from the suicidal act. It is against risks of this nature—the destruction of life by the voluntary and intentional act of the party assured—that the exception in the proviso is intended to protect the insurers. The moral responsibility for the act does not affect the nature of the hazard. The object is to guard against loss arising from a particular mode of death. The *causa causans*, the motive or influence which guided or controlled the will of the party in committing the act, are immaterial, as affecting the risk which the insurers intended to except from the policy. This view is entirely consistent with the nature of the contract. It is the ordinary case of an exception of a risk which would otherwise fall within the general terms of the policy. These comprehended death by disease, either of the body or

brain, from whatever cause arising. The proviso exempts the insurers from liability when life is destroyed by the act of the party insured, although it may be distinctly traced as the result of a diseased mind. It may well be that insurers would be willing to assume the risk of the results flowing from all diseases of the body, producing death by the operation of physical causes, and yet deem it expedient to avoid the hazards of mental disorder, in its effects on the will of the assured, whether it originated in bodily disease, or arose from external circumstances, or was produced by a want of moral and religious principle.

“It was urged very strongly by the learned counsel for the plaintiffs, that this view of the construction of the contract was open to the fatal objection that it would necessarily lead to the absurd conclusion that death occasioned by inevitable accident or overpowering force, or in a fit of delirium or frenzy, if the proximate and immediate cause was the hand of the person insured, would be excepted from the risks assumed by the defendants. But this objection is sufficiently answered by the obvious suggestion that such an interpretation, although within the literal terms of the proviso, would be contrary to a reasonable intent, as derived from the subject-matter of the contract. An argument having for its basis a *reductio ad absurdum* is not entitled to much weight when it is necessary to ascertain the intention of the parties to a contract, and to conform to that intention in giving an interpretation to the language used. Indeed, when it becomes necessary (as the case on the part of the plaintiffs requires) to desert the literal import of terms adopted by parties to express their meaning, as it cannot be reasonably supposed that they intended to enter into stipulations which would be unreasonable or absurd, all conclusions which tend to establish such a result are necessarily excluded. The question in such cases is not how far can the literal meaning of words be extended, but what is a reasonable limitation and qualification of them, having regard to the nature of the contract and the objects intended to be accomplished by it. Applying this principle to the present proviso, and assuming that the plaintiffs are right in their posi-

tion, that the words used are not to be interpreted literally, it would seem to be reasonable to hold that they were intended to except from the policy all cases of death caused by the voluntary act of the assured, when his deed of self-destruction was the result of intention, by a person knowing the nature and consequences of the act, although it may have been done under an insane delusion, which rendered the party morally and legally irresponsible, incapable of distinguishing between right and wrong, and which, by disturbing his reason and judgment, impelled him to its commission. If the suicide was an act of volition, however excited or impelled, it may in a just sense be said that he died by his own hand. But beyond this it would not be reasonable to extend the meaning of the proviso. If the death was caused by accident, by superior and overwhelming force, in the madness of delirium, or under any combination of circumstances from which it may be fairly inferred that the act of self-destruction was not the result of the will or intention of the party adapting means to the end, and contemplating the physical nature and effects of the act, then it may be justly held to be a loss not excepted within the meaning of the proviso. A party cannot be said to die by his own hand in the sense in which these words are used in the policy, whose self-destruction does not proceed from the exercise of an act of volition, but is the result of a blind impulse, of mistake or accident, or of other circumstances over which the will can exercise no control.

“In seeking to ascertain the intention of parties, some weight is to be given to the practical results which would be likely to follow from the adoption of a particular construction of the words of a contract. It is reasonable to suppose that these were in contemplation of the insurers at the time the policy was issued. Certainly it is fair to infer that they intended to put some material limitations upon their liability by the insertion of this proviso. But if it is to be construed as including only cases of criminal self-destruction, it would rarely, if ever, effect this object. Those familiar with the business of insurance, and with the results of actions on policies of insurance in courts of law, know how difficult it is to

establish a case of exemption from liability under an exception in a policy, where it depends on a question of fact to be decided by the verdict of a jury. If this is true in regard to ordinary claims under policies, it is obvious that the difficulty would be greatly enhanced in cases like the present, where it would be sufficient, in order to take a case out of the operation of the proviso, to prove that self-destruction was the result of insanity. It would not be hazardous to affirm that, in all cases where such an issue was to be determined by a jury between an insurance company and the representatives of the deceased, the act of suicide would be taken as proof of insanity. Such considerations were not likely to have escaped the intention of practical men in framing this general proviso; and, in a doubtful case of construction, they are not to be overlooked in giving an interpretation to the words used by them.

“The learned counsel for the plaintiffs have insisted with great force on an argument drawn from the context, to show that the proviso was intended to embrace only a case of criminal self-destruction by a reasonable and responsible being. But it seems to us that the maxim *noscitur a sociis*, on which they rely, does not aid the construction for which they contend. The material part of the clause is, that the policy shall be void if the assured ‘shall die by his own hand, or in consequence of a duel, or by the hands of justice, or in the known violation of any State, national, or provincial law.’ Now the first and most obvious consideration suggested by other parts of this clause is, that in enumerating the causes of death which shall not be deemed to be within the risks covered by the policy, one of them is in terms made to depend on the existence of a criminal intention. It is a ‘known’ violation of law, which is to avoid the policy. This tends very strongly to show that where an act producing death may be either innocent or criminal, if it is intended to except only such as involves a guilty intent, it is carefully so expressed in the proviso. The inference is very strong that if they designed to confine the exception in question to cases of criminal suicide, it would have been so provided in explicit terms. So far, the

argument drawn from the context does not support the plaintiffs' claim. Take then another of the causes of death, death in a duel, enumerated in the proviso.

"It seems to us to be a *petitio principii* to assume that death in consequence of a duel necessarily implies an act for which the party would be criminally responsible. Why is not this part of the proviso open to the same argument as that which is urged in regard to the clause relating to self-destruction? A duel may be fought by a party acting under duress, or impelled thereto by an insane delusion, which might blind his moral perceptions and render him legally irresponsible. If so, then the same answer to a defence set up against a claim under the policy would be open under this clause, as the one now urged in behalf of the plaintiffs; and the argument, founded on the assumption that a forfeiture under this part of the proviso necessarily involves a criminal violation of law, falls to the ground. Therefore the inference that a guilty intention is communicated from this branch of the proviso to that relating to death by the act of the assured, seems to us to be unfounded. The only remaining clause is that which provides for the case of death by the hands of justice. This undoubtedly implies that the person insured has been found guilty of a criminal act by a judicial tribunal, according to the established forms of law. But it is not correct to say that it involves the existence of a criminal intent, because it might be shown that the conviction of the assured was erroneous, and that he was in fact innocent of the crime for which he suffered the penalty of death. So far, therefore, as any argument can be justly drawn from the connection in which the words as to self-destruction stand in relation to other parts of the proviso, it leads to the conclusion that it was not solely death occasioned by acts of the assured involving criminal intent or a wilful violation of law by a person morally and legally responsible, which was intended to be excepted from the risks assumed by the insurers; but that, with the exception of death in a known violation of law, the proviso embraces all cases where life is taken in consequence of the causes specified, without regard to the question, whether at the time the

assured was amenable for his act, either *in foro conscientie*, or in the tribunals of justice.

“It may be added that a departure from the literal terms of a contract is always attended with great difficulty and danger, because it is apt to lead to great latitude of construction, and to give uncertainty to the language which the parties have adopted to express their meaning. It certainly never should be extended beyond the clear intent of the parties, as derived from other parts of the agreement, or the subject-matter to which the contract relates. This position may be illustrated by reference to another part of the policy declared on. The proviso which precedes that on which the present question has arisen contains a stipulation that the policy shall be void if the assured, without the consent of the defendants in writing, shall during certain portions of the year visit the more southerly parts of the United States, or shall pass without the settled limits of the United States. If the assured in a fit of insanity should wander from his home and go within the prohibited territory, would the policy be void? If he was taken prisoner and went thither with his captors, would he lose his claims under the policy? These and similar questions, which might arise under other clauses of the policy, seem to show that it is more safe to adhere to the strict letter of the contract, and to hold parties to the salutary rule which requires them to express in clear and unambiguous terms any exceptions which they desire to engraft on the general words of a contract.

“So far as the adjudicated cases bear on the question which we have considered in the present case, the weight of authority is against the claim of the plaintiffs under the policy. In the case of *Borradaile v. Hunter*,¹ where the policy contained a proviso very similar to that found in the policy declared on, it was held that the policy was avoided, as the proviso included all cases of voluntary self-destruction, and was not limited to acts of criminal suicide. From this opinion there was a dissent by the Chief Justice. In *Clift v. Schwabe*,² a similar decision was made by the Exchequer Chamber, two of the

¹ 5 Man. & Gr. 639.

² 3 C. B. 437.

judges dissenting. These cases seem now to be regarded as having settled the law in England in conformity with the opinion of the majority of the judges.¹ A different opinion was arrived at in *Breasted v. Farmers' Loan and Trust Company*,² from which, however, several of the most learned justices of the court of appeals dissented.

"In 1 Phil. Ins.,³ it is stated that any mental derangement sufficient to exonerate a party from a contract would render a person incapable of occasioning the forfeiture of a policy under a clause like the one in question. In support of this proposition no authorities are cited except the cases above named of *Borradaile v. Hunter* and *Breasted v. Farmers' Loan and Trust Company* as reported in 4 Hill. If it is intended by it to assert that the principle on which a contract made with an insane person is held to be void as to him, applies to this clause so as to exclude from its operation all cases of self-destruction occasioned by insanity, it seems to us that the position is untenable. The reason for the rule which exempts a person from liability on a contract into which he entered when insane is, that he is not deemed to have been capable of giving an intelligent assent to its terms. But this rule is not applicable where a contract is made with a person in the full possession of his faculties, and he subsequently, in a fit of insanity, commits a breach of it, or incurs a penalty under it. He is then bound by it. His mind and will have assented to it. No subsequent mental incapacity will absolve him from his responsibility on it, unless from its nature it implies the continued possession of reason and judgment and the action of an intelligent will. A party may be liable on an unexecuted contract, after he has lost the use of his mental faculties, as he may be held responsible *civiliter* for his torts.⁴

"To say that insanity exonerates a party from a forfeiture under such a proviso in a policy, is to assume that this was the intention of the parties when the contract of insurance

¹ *Dufaur v. Professional Life Ass. Co.*, 25 Beav. 602.

² 4 Hill (N. Y.), 74, and 4 Selden, 299.

³ Sect. 895.

⁴ *Bagster v. Portsmouth*, 7 Dowl. & Ryl. 614; *Weaver v. Ward*, 110b. 134; *Cross v. Andrews*, Cro. Eliz. 622.

was entered into. But if such was not the intention, then it follows that the assured gave an intelligent assent to a contract, by which he stipulated that if he took his own life voluntarily, knowing the consequences of his act, he would thereby work a forfeiture of his claim under the policy, although he may have acted under the influence of insanity in committing the suicidal act. So that, after all, we are brought back to the inquiry, what was the intention of the parties to the contract, in order to ascertain the true construction of the proviso.

“The result to which we have come, after a careful and deliberate consideration of the question, during which we have felt most sensibly the very great difficulties and embarrassments which surround the subject, is, that the plaintiffs are not entitled to recover. The facts agreed by the parties concerning the mode in which the plaintiffs’ intestate took his own life leave no room for doubt that self-destruction was intended by him, he having sufficient capacity at the time to understand the nature of the act which he was about to commit, and the consequences which would result from it. Such being the fact, it is wholly immaterial to the present case that he was impelled thereto by insanity, which impaired his sense of moral responsibility, and rendered him to a certain extent irresponsible for his actions.”

§ 311. Afterwards, in 1866, the question arose in the Supreme Court of Maine, in *Eastabrook v. Union Mutual Life Insurance Company*,¹ where it was held that the representatives of an insane suicide might recover upon the policy, the facts being fully stated in the opinion. The policy provided that in case the insured should “die by his own hand, or in consequence of a duel, or by the violation of any State, national, or provincial law, or by the hands of justice,” it should be void. The death was by suicide in a fit of insanity, and the question was whether death under such circumstances is within the condition. The learned judge,² after

¹ 54 Me. 224.

² Appleton, C. J., in *Eastabrook v. Union Mut. Life Ins. Co.*, 54 Me. 224. Kent, J., dissented, but delivered no opinion.

adverting to the diversity of judicial opinions, both in England and in this country, proceeds as follows: "In this conflict of authority, it may not be amiss to briefly examine the question, and to endeavor to determine what conclusions will best accord with the object of the policy and with the intent of the parties as ascertainable from the language upon the recognized principles of interpretation.

"An insurance upon life is of comparatively recent date. A creditor may insure upon the life of his debtor, or one may insure upon his own life for the benefit of his family. In no event can the person upon whose life the policy is effected be benefited by his own death. Death, whether by disease, by accident, or the result of insanity, is in each case within the general object of the policy.

"The terms 'suicide' and 'dying by one's own hand' are generally used synonymously. Sometimes one form of expression is used, and sometimes the other. They have the same meaning. Dying by one's own hand is but another form of expression for suicide.

"The phrase, 'die by one's own hand,' may include all cases of death by the person upon whose life the policy is effected, or it may receive limitations. If limitations, then the inquiry arises as to the extent of those limitations. The authorities concur in this, that the expression does not embrace all cases of death by one's own hand. If the insured kill himself by drinking poison, not being aware that it was poison; or by snapping a loaded pistol, ignorant that it was loaded; or by leaping from a window in the delirium of a fever,—it is conceded that he would not die by his own hand, within the meaning of the clause under consideration, though he might literally die by his own hand, that is, by his own act.

"'It is to be observed,' remarks Tindal, C. J., in *Borradaile v. Hunter*, 'that the words of the proviso are the words not of the assured, but of the insurers, introduced by themselves for the purpose of their own exemption and protection from liability; both in reason and good sense, therefore, no less than upon the acknowledged principles of legal construction, they are to be taken most strongly against those who speak the

words, and most favorably for the other party. For it is no more than just that, if the words are ambiguous, he whose meaning they are intended to express, and not the other party, shall suffer by the ambiguity.' That they are ambiguous is conceded, for the courts in no cases have given them a literal construction. When death is the result of insanity, it is equally the result of disease, for which the insane is in no respect responsible. It is a well-settled physiological principle, 'that disturbed intelligence has the same relation to the brain that disordered respiration has to the lungs and pleura.' Death, then, by an insane suicide is as much death by disease as though it were death by fever or consumption. Death by accident or mistake, though by the party's own hand, is not within the condition. Death by disease is provided for by the policy. Insanity is disease. Death, the result of insanity, is death by disease. The insane suicide no more dies by his own hand, than the suicide by mistake or accident. If the act be not the act of a responsible being, but is the result of any delusion or perversion, whether physical, intellectual, or moral, it is not the act of the man. 'If they (the insurers) intended the exception to extend both to the case of felonious self-destruction, and self-destruction not felonious, they ought,' observes Tindal, C. J., in *Borradaile v. Hunter*, 'so to have expressed it clearly in the policy; and that, at all events, if they have left it doubtful on the face of the policy whether it is so confined or not, that doubt ought, in my opinion, to be determined against them; for it is incumbent on them to bring themselves within the exception, and, if their meaning remains in doubt, they have failed so to do.'

"The different English life insurance companies (when unwilling to incur the risk of suicidal insanity) have guarded against such risk by language clearly excluding it from the policy. Thus, the Equitable has the condition, 'if the insured shall die by his own hand, being at the same time sane or insane;' the Eagle, 'if he shall die by his own act, whether sane or insane.' In the policies of the Solicitors' and General Life Assurance, the condition is, if he die by his own act, 'whether felonious or not.'

“The policy in the clause under consideration refers to death by his own hand, or in consequence of a duel, or the violation of any State, national, or provincial laws, or by the hands of justice. All the other cases after the first involve criminal delinquency. They involve intentional misdoing. They assume criminal intention. They are cases where death occurs in consequence of committing a felony or other violation of law on the part of the insured. There must in all be moral, as well as legal, responsibility. *Noscitur a sociis* is a familiar maxim in the interpretation of covenants. The other members of the sentence, connected with the verb ‘die,’ imply death as the result of crime committed by a responsible being. The first of these conditions, to which the others refer, and with which they are connected, must equally with the others refer to a felonious death, to the case of *felo de se*, not to the case of a death without legal or moral blame, — the result of accident, mistake, or disease.

“The madman who in a fit of delirium commits suicide, as much dies by his own hand as does the individual who accidentally and unintentionally takes his own life. They each die by their own hands, but without moral responsibility or legal blame. One is no more within the conditions of the policy than the other. In each case it should receive the same construction.

“That a jury would be likely to regard suicide as proof of insanity does not affect the conclusion. If suicide is to be regarded as evidentiary of insanity, as it unquestionably is in most cases, then they generally arrive at correct results. If it is not properly to be so regarded, it may be an argument against a trial by jury, that the tribunal is one which allows itself to be governed by its prejudices rather than by the proofs; but it is none against the construction of the policy that death by the hands of the insured, whether by accident, mistake, or in a fit of insanity, is to be governed by one and the same rule.

“Nor does the case of suicide, by one insane, fall within the danger to guard against the occurrence of which this condition was inserted. ‘A policy,’ observes Maule, J., in *Borradaile v. Hunter*, ‘by which the sum is payable on the death of the

person assured in all events, gives him a pecuniary interest that he should die immediately, rather than at a future time, to the extent of the excess of the value of a present payment over a deferred one, and offers a temptation to self-destruction to that extent. To protect the insurers against the increase of risk arising out of this temptation, is the object for which the condition is inserted.' The reason here given assumes, or presupposes, sanity on the part of the insured. It implies a motive acting on a sane mind, for sanity is in all cases to be presumed. But, in fact, there is very slight foundation for any such reasoning. The person whose life is insured never receives money after his death. Suicide for the benefit of others is rare, exceptional, and Quixotic. The love of life, the strongest sentiment of our nature, affords reasonable security against a danger so remotely probable. An insane man would be little likely to calculate the difference in value between a payment to be made immediately and one indefinitely deferred, and kill himself that some one else might receive the money at an earlier date in consequence of his committing suicide. The evidence affords not the slightest indication that any such motive had any influence in the present case.

"Where the policy is on the life of a mariner, as in the one under consideration, 'the insurance can be no inducement to a criminal act, and may be reasonably construed to cover this as well as every other risk. There is, indeed, no reason why it should not do so; for the general tables of mortality, which form the basis of the calculations upon which the policy is founded, include this as well as every other cause of death, so that the particular risk is actually insured against.'"¹

§ 312. The doctrine laid down in *Dean v. American Mutual Life Insurance Company*,² has since been adopted and followed by Mr. Justice McKennan in the Circuit Court of the United States for the Western District of Pennsylvania,³ and in Kentucky.⁴ In the case from Kentucky the following instruc-

¹ Bunyon on Life Insurance, 73.

² 4 Allen (Mass.), 96.

³ *Nimick v. Mut. Benefit Life Ins. Co.*, 3 Brewster, 502; s. c. Am. Law Reg. Feb. 1871.

⁴ *St. Louis Mut. Life Ins. Co. v. Graves*, 6 Bush (Ky.), 268.

tions were held to be erroneous: "That although the jury may be satisfied that Leslie C. Graves, whose life was insured by the defendant, committed suicide, and that when he did his intellect was unimpaired, and that he knew it was forbidden both by moral and human law; yet if they believe, from all the evidence, that at the instant of the commission of the act his will was subordinated by an uncontrollable passion or emotion, causing him to do the act, it was an act of moral insanity," and would not avoid the policy. In England, the rule laid down by the majority of the judges in the cases of *Borradaile v. Hunter* and *Clift v. Schwabe* was followed in *White v. The British Empire Mutual Life Assurance Company*,¹ in which the Vice-Chancellor (Malins) took occasion to intimate that that opinion was so clearly the better law that he did not wish to hear any argument on behalf of the defendants. In *Stormont v. Waterloo Life and Casualty Assurance Company*,² the insured committed suicide by throwing himself out of the window, and the court told the jury that the question was, did the assured know that he was throwing himself out of the window? If he did, no recovery could be had under the policy. Otherwise if he did not.

§ 313. And more recently the Supreme Court of Massachusetts, having occasion to reconsider the question,³ adheres to its former decision, and thus states the present position of the question.

"The proviso in the policy is, that it shall be void if the assured 'shall die by suicide.' The plaintiff offered to prove that the assured, at the time of committing the act of self-destruction, was insane; that he acted under the impulse of insanity; and that his act of self-destruction was the direct result of his insanity. The question presented is, whether, if these facts are true, the act of self-destruction avoids the policy, within the terms of the proviso. The subject has been so fully discussed in the cases cited, that further argument is needless. We need only collate the cases.

"In *Borradaile v. Hunter*,⁴ the words were, 'if the assured

¹ 38 L. J. N. S. Ch. 53.

² 1 F. & F. *Nisi Prius*, 22.

³ *Cooper v. Massachusetts Mut. Life Ins. Co.*, 102 Mass. 227.

⁴ 5 Man. & Gr. 639.

should die by his own hand.' He drowned himself in the Thames; and the jury found that he did it voluntarily, but that he was not capable of judging between right and wrong. It was held that the proviso was not limited to acts of felonious suicide, and that the policy was void. Tindal, C. J., dissented. But the jury were instructed that it must appear that the assured was conscious of the probable consequences of his act, and did it for the express purpose of destroying himself voluntarily, having at the time sufficient mind and will to destroy himself.

In *Clift v. Schwabe*¹ the words were, "should commit suicide." The assured swallowed a quantity of sulphuric acid, sufficient to occasion death, for the purpose of killing himself, of which he died the next day. It was held by Parke and Alderson, BB., Patteson, J., and Rolfe, B., to be immaterial whether he was a responsible agent. Pollock, C. B., and Wightman, J., dissented. But Alderson, B., says the words do not apply to cases in which the will is not exercised at all, as when death results from an accident or delirium, but when the destruction is voluntary, though the will may be perverted.

In *Dean v. American Insurance Company*,² the words were like those in *Borradaile v. Hunter*, "shall die by his own hand." The assured cut his throat with a razor. The plaintiff, however, alleged and offered to prove that the act whereby the death was caused was the direct result of insanity; that the insanity was what is called suicidal depression, impelling him to take his life, and that suicide is the necessary and direct result of such insanity or disease; and it was held that this avoided the policy. But Bigelow, C. J., in giving the opinion, adverts to the word "suicide," and avoids discussing its signification; thereby leaving the present case undecided by this court. But he says that if the death is caused in the madness of delirium, or under any combination of circumstances from which it may be fairly inferred that the act of self-destruction was not the result of the will and intention of the party, adapting the means to the end, and contemplating the physical nature and effects of the act, it would not be

¹ 3 C. B. 437.

² 4 Allen (Mass.), 96.

within the policy. This limitation is, in substance, the same with that which is quoted from the other cases cited.

"In *Estabrook v. Union Insurance Company*,¹ the words were, 'shall die by his own hand.' The jury found that the self-destruction was the result of a blind and irresistible impulse over which the will had no control, and was not an act of volition. It was held that this did not avoid the policy; and Appleton, C. J., in a very elaborate opinion, says the decision was in entire conformity with the law as stated in *Dean v. American Insurance Company*, referring to the limitation stated above. But Kent, J., dissented.

"In *Breasted v. Farmers' Loan and Trust Company*,² the words were 'should die by his own hand.' It was held by a majority of the court of appeals, three of the justices dissenting, that, if the assured was insane, and incapable of discerning between right and wrong, his suicide did not avoid the policy. This decision is at variance with the other authorities cited, and is contrary to our own interpretation of the same words in *Dean v. American Insurance Company*.

"Upon a careful consideration of the elaborate discussion of the matter in the cases above cited, by the dissenting judges as well as by those in the majority, we think that, as applied to this case, there is no substantial difference of significance between the phrases 'shall die by his own hand,' 'shall commit suicide,' and 'shall die by suicide;' and that they include self-destruction under the influence of insanity, within the limitation above stated. In the present case, there was no offer to prove madness of delirium, or that the act of self-destruction was not the result of the will and intention of the party, adapting the means to the end, and contemplating the physical nature and effects of the act. The insanity, therefore, was not such as to take the case out of the proviso."

§ 314. In *Fowler v. Mutual Life Insurance Company*,³ the facts made it so plain that the insured was a voluntary suicide, that the court refused to submit the question whether the act was an insane or an involuntary one to the jury,—after

¹ 54 Me. 224.

² 4 Seld. (N. Y.) 299.

³ 4 Lansing (N. Y.), 202.

intimating that the question would be, if there were any question on the evidence, whether the act was voluntarily done, without reference to the question whether the insured was, or was not, a responsible moral agent.

§ 315. In *Mallory v. Travellers' Insurance Company*,¹ the court instructed the jury that if the condition of the deceased at the time of death was such that he could not distinguish between right and wrong, if it was such that he did not know that he was doing an act which would produce death, the plaintiff might recover, indicating a tendency to adopt the doctrine of the Massachusetts cases, and said, on appeal to the general term of the same court, to have been an instruction quite as favorable to the defendants as the rule in New York would allow.

§ 316. In the case of *Van Zandt v. Mutual Benefit Life Insurance Company*,² the court adheres to the rule theretofore laid down in that State that the suicide must be felonious, and by one who was able to appreciate the moral effect and consequences of his act, in order to prevent a recovery, and distinctly refused to sustain the doctrine that if the insured destroy his own life voluntarily and wilfully, having at the time sufficient power of mind and reason to understand the physical nature and consequences of such an act, and having the purpose and intention to cause death by the act, he cannot recover. And it was also held in the same case that there was no essential difference whether the provision was "in case he shall die by his own hand, in or in consequence of a duel, or by reason of intemperance," or "in case he shall die by his own hand in consequence of a duel," &c.

§ 317. In *Isett v. American Life Insurance Company*,³ the insured committed suicide by shooting himself with a pistol, and the policy provided that if the insured "die by his own hand" the insurer should not be liable. The jury were instructed that if the insured at the time of his death was conscious that his death would follow the discharge of the

¹ N. Y. Sup. Ct. 1870; s. c. affirmed, 47 N. Y. 52.

² New York Supreme Court, Gen. Term, 4th Dept., June, 1872, not yet reported.

³ Court of Common Pleas, Blair County, Penn., May, 1872, 1 Ins. L. J. 715.

pistol in his hands, though he was laboring under mental depression or disturbance of mind, or if he destroyed his life because he was suffering from some physical infirmity, and for the purpose of escaping from such infirmity, there could be no recovery; that sanity was to be presumed and insanity to be proved by the party alleging it, and that suicide is not of itself proof of insanity, but to be considered with other facts and circumstances in the case.

§ 318. In *Gay v. Union Mutual Life Insurance Company*, tried before Woodruff and Shipman, JJ.,¹ where the insured shot himself in the head with a pistol, the jury were charged that if the insured at the time he fired the pistol was conscious of the act he was committing, intended to take his own life, and was capable of understanding the nature and consequences of the act, the insurers were not liable; that if the act was thus committed, it was immaterial whether he was capable of understanding its moral aspects, or of distinguishing between right and wrong; and that if he was not thus conscious, or had no such capacity, but acted under an insane delusion overpowering his understanding and will, or was impelled by an uncontrollable impulse which neither his understanding nor will could resist, the insurers were liable.

§ 319. In *Terry v. Life Insurance Company*, Mr. Justice Miller stated the conclusions at which he had arrived as the result of an examination of the authorities upon this point, in his charge to the jury, as follows: "It being agreed that the deceased destroyed his life by taking poison, it is claimed by the defendants that he 'died by his own hand,' within the meaning of the policy, and that they are therefore not liable. This is so far true, that it devolves on the plaintiff to prove such insanity on the part of the deceased, existing at the time he took the poison, as will relieve the act of taking his own life from the effect which, by the general terms used in the policy, self-destruction was to have, namely, to avoid the policy. It is not every kind or degree of insanity which will so far excuse the party taking his own life as to make the company insuring liable. To do this, the act of self-destruction must

¹ 9 Blatch. C. Ct. (U. S.) 142.

have been the consequence of insanity, and the mind of the deceased must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing. If he was impelled to the act by an insane impulse, which the reason which was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, then the company was liable. On the other hand, there is no presumption of law, *prima facie* or otherwise, that self-destruction arises from insanity; and if you believe, from the evidence, that the deceased, although excited or angry, or distressed in mind, formed the determination to take his own life, because in the exercise of his usual reasoning faculties he preferred death to life, then the company is not liable, because he died by his own hand within the meaning of the policy.”¹

§ 320. And the doctrine of this case was affirmed on appeal to the Supreme Court of the United States,² Mr. Justice Hunt delivering the opinion of the court, which was as follows:—

“This action was brought to recover the sum of two thousand dollars, claimed to be due upon a policy of insurance on the life of George Terry, made and issued to the plaintiff, his wife.

“The policy contained a condition, of which a portion was in the following words, viz.: ‘If the said person whose life is hereby insured . . . shall die by his own hand, . . . this policy shall be null and void.’

“Within the terms of the policy George Terry died from the effects of poison taken by him.

“Evidence was given tending to show that at the time he took the poison he was insane. Evidence was also given, tending to show that at that time he was sane, and capable of knowing the consequences of the act he was about to commit.

“Thereupon the counsel for the defendant asked the court to instruct the jury,—

¹ 1 Dillon, C. Ct. (U. S.) 8th Circuit, 403.

² Mut. Life Ins. Co. of New York, plaintiff in error v. Mary Terry, Albany Law Journal, May 17. 1873.

"1. If the jury believe, from the evidence in the case, that the said George Terry destroyed his own life, and that, at the time of self-destruction, he had sufficient capacity to understand the nature of the act which he was about to commit, and the consequences which would result from it, then, and in that case, the plaintiff cannot recover on the policy declared on in this case.

"2. That if the jury believe from the evidence that the self-destruction of the said George Terry was intended by him, he having sufficient capacity at the time to understand the nature of the act which he was about to commit, and the consequences which would result from it, then, and in that case, it is wholly immaterial in the present case that he was impelled thereto by insanity, which impaired his sense of moral responsibility, and rendered him, to a certain extent, irresponsible for his action.

"Which instructions, and each one of said instructions, the court refused to give to the jury, but the court did charge the jury as follows.¹ . . .

"The request proceeds upon the theory that if the deceased had sufficient mental capacity to understand the nature and consequence of his act,—that is, that he was about to take poison, and that his death would be the result,—he was responsible for his conduct, and the defendant is not liable; and the fact that his sense of moral responsibility was impaired by insanity does not affect the case.

"The charge proceeds upon the theory that a higher degree of mental and moral power must exist; that although the deceased had the capacity to know that he was about to take poison, and that his death would be the result, yet if his reasoning powers were so far gone that he could not exercise them on the act he was about to commit, its nature and effect, or if he was impelled by an insane impulse which his impaired capacity did not enable him to resist, he was not responsible for his conduct, and the defendant is liable.

"It may not be amiss to notice that the case does not present the point of what is called emotional insanity, or *mania*

¹ See preceding section.

transitoria, that is, the case of one in possession of his ordinary reasoning faculties, who allows his passions to convert him into a temporary maniac, and while in this condition commits the act in question. This case is expressly excluded by the last clause of the charge, in which it is said that anger, distress, or excitement does not bring the case within the rule if the insured possesses his ordinary reasoning faculties.

“The case of *Borradaile v. Hunter*¹ is cited by the insurance company. The case is found also in 2 Bigelow’s Life and Accident Insurance Cases, p. 280, and in a note appended are found the most of the cases upon the subject before us. The jury found in that case that the deceased voluntarily took his own life, and intended so to do, but at the time of committing the act he was not capable of judging between right and wrong. Judgment went for the defendant, which was sustained upon appeal to the full bench. The counsel for the company argued that where the act causing death was intentional on the part of the deceased, the fact that his mind was so far impaired that he was incapable of judging between right and wrong did not prevent the proviso from attaching; that moral or legal responsibility was irrelevant to the issue. The court adds: ‘It may very well be conceded that the case would not have fallen within the meaning of the condition had the death of the assured resulted from an act committed under the influence of delirium, or if he had, in a paroxysm of fever, precipitated himself from a window, or, having been bled, removed the bandages, and death, in either case, had ensued. In these and many other cases that might be put, though, strictly speaking, the assured may be said to have died by his own hands, the circumstances clearly would not be such as the parties contemplated when the contract was entered into.’

“In delivering the opinion of the court, Erskine, J., says all that the ‘contract requires is, that the act of self-destruction should be the voluntary and wilful act of a man having at the time sufficient powers of mind and reason to understand the physical nature and consequences of such act, and having at the time a purpose and intention to cause his own death by

¹ 5 Man. & Gr. 639.

that act, and 'the question, whether at the time he was capable of understanding the moral nature and quality of his purpose, is not relevant to the inquiry further than as it might help to illustrate the extent of his capacity to understand the physical character of the act itself.' Chief Justice Tindal dissented from the judgment. In speaking of the verdict, he says: 'It is not, perhaps, to be taken strictly as a verdict that the deceased was *non compos mentis* at the time the act was committed, for if the latter is the meaning of the jury, the case would then fall within that description mentioned in the argument to be without the reach of the proviso, namely, the case of death inflicted on himself by the party while under the influence of frenzy, delusion, or insanity.' This authority was followed in *Clift v. Schwabe*,¹ where it was substantially held that the terms of the condition included all acts of voluntary self-destruction, and that whether the party is a voluntary moral agent is not in issue.

"These decisions expressly exclude the question of mental soundness. They are in hostility to the tests of liability or responsibility adopted by the English courts in other cases, from Coke and Hale onwards. Coke said, 'A little madness deprives the lunatic of civil rights or dominion over property, and annuls wills.' But, to exempt from responsibility for crime, he says, 'Complete ignorance of the knowledge of right and wrong must exist.' Lord Mansfield holds the legal test of a sound mind to be the knowledge of right and wrong, good and evil; of which the converse is ignorance of knowledge of right and wrong, of good and evil. Lord Lyttleton held the test to be the state called *compos mentis*, or sound mind. Lord Erskine defined it to be the absence of any practicable delusion traceable to a criminal or immoral act.² In 1 Prichard, p. 16 (on the different forms of insanity), will be found the somewhat lengthy definition of insanity by Lord Lyndhurst.³

"The English judges refuse to apply to the act of the insured in causing his death the principles of legal and moral

¹ 3 C. B. 437.

² Defence of Hadfield.

³ 1 Shelf. Lun. 46.

responsibility recognized in cases where the contract, the last will, or the alleged crime of such person may be in issue. . . .

"There is a conflict in the authorities which cannot be reconciled. The propositions embodied in the charge before us are in some respects different from each other, but in principle they are identical. They rest upon the same basis, the moral and intellectual incapacity of the deceased. In each case the physical act of self-destruction was that of George Terry. In neither was it truly his act. In the one supposition he did it when his reasoning powers were overthrown, and he had not power or capacity to exercise them upon the act he was about to do. It was in effect as if his intellect and reason were blotted out or had never existed. In the other, if he understood and appreciated the effect of his act, an uncontrollable impulse, caused by insanity, compelled its commission. He had not the power to refrain from its commission, or to resist the impulse. Each of the principles put forth by the judge rests upon the same basis, that the act was not the voluntary, intelligent act of the deceased. The causes of insanity are varied as the varying circumstances of man.

" 'Some for love, some for jealousy,
For grim religion some, and some for pride,
Have lost their reason; some for fear of want,
Want all their lives; and others every day,
For fear of dying, suffer worse than death.'¹

"When we speak of the 'mental condition' of a person we refer to his senses, his perceptions, his consciousness, his ideas. If his mental condition is perfect, his will, his memory, his understanding are perfect, and connected with a healthy bodily organization. If these do not concur, his mental condition is diseased or defective.

"Excessive action of the brain whereby the faculties become exhausted, a want of proper action whereby the functions become impaired and diminished, the visions, delusions, and mania, which accompany irritability, or the weakness which results from an excess of vital functions, indigestion and sleeplessness, are all a result of a disturbance of the physical sys-

¹ Armstrong on Health, book iv. ver. 113-118. Cited Shelf. Lun. In. 1, 43.

tem. The intellect and intelligence of man are manifested through the organs of the brain, and from these, consciousness, will, memory, judgment, thought, volition, and passion, the functions of the mind do proceed. Without the brain these cannot exist. With an injured or diseased brain, their powers are impaired or diminished.

“ We have not before us the particular facts on which the question of the sanity of Terry was presented. We may assume that proof was given upon which the propositions of the charge were based. We do not know whether he was sleepless, unduly excited, or unnaturally depressed ; whether he had abandoned his accustomed habits and pursuits and adopted new and unusual ones ; from a quiet, orderly man, he had become disorderly, vicious, or licentious ; whether his fondness for his wife and children had changed to dislike and abuse ; or jealousy, pride, the fear of want, the fear of death had overtaken him ? He may have realized the state supposed by the counsel in arguing *Borradaile v. Hunter*, viz., that his death might have resulted from an act committed under the influence of delirium, or that in a paroxysm of fever he might have precipitated himself from a window, or having been bled he might have torn away the bandages. Whether he swallowed poison, or did the other insane acts, might result from the same condition of body and mind.

“ Delirium, fever, tearing away the bandages for preserving the life, the taking of poison, in a case like that before us, are all results of bodily disease. If bodily disease in these, or other forms, overthrew Terry’s reasoning faculties, in other words, destroyed his consciousness, his judgment, his volition, his will, he remained the form of the man only. The reflecting, responsible being did not exist. In the language of the successful counsel in *Borradaile v. Hunter*, ‘ in these and many other cases, though, strictly speaking, the assured may be said to have died by his own hands, the circumstances clearly would not be such as the parties contemplated when the contract was entered into.’

“ That form of insanity called impulsive insanity, by which the person is irresistibly impelled to the commission of an

act, is recognized by writers on this subject. It is sometimes accompanied by delusions, and sometimes exists without them. The insanity may be patent in many ways, or it may be concealed. We speak of the impulses of persons of unsound mind. They are manifested in every form, — breaking of windows, destruction of furniture, tearing of clothes, firing of houses, assaults, murders, and suicides. These cases are to be carefully distinguished from those where persons in the possession of their reasoning faculties are impelled by passion, merely in the same direction.¹

“Dr. Ray, cited by Fisher, approves the charge of the judge in Haskell’s case, where he says: ‘The true test lies in the word *power*. Has the defendant in a criminal case the power to distinguish right from wrong, *and the power to adhere to the right and avoid the wrong?*’”²

“The question of sanity has usually been presented upon the validity of an agreement, the capacity to make a will, or upon responsibility for crime. If Terry had made an agreement under the circumstances stated in the charge, a jury or court would have been justified in pronouncing it invalid. A will, then, made by him, would have been rejected by the surrogate if offered for probate. If, upon trial for a criminal offence, upon all the authorities, he would have been entitled to a charge, that upon proof of the facts assumed, the jury must acquit him.”³

“We think a similar principle must control the present case, although the standard may be different. We hold the rule on the question before us to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are

¹ See Blundford on Insanity, — “Impulsive Insanity.”

² Fisher on Insanity, p. 83.

³ Freeman v. People, 4 Denio, 9; Willis v. People, 32 N. Y. 719; Seaman So. v. Hoffer, 33 ib. 619; The Marquis of Winchester’s Case, 6 Coke, 23; Combe’s Case, Moore, 759

so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable.

“In the present instance, the contract of insurance was made between Mrs. Terry and the company, the insured not being in form a party to the contract. Such contracts are frequently made by the insured himself, the policy stating that it is for the benefit of the wife, and that in the event of death the money is to be paid to her. We see no difference in the cases. In each it is the case of a contract, and is to be so rendered as to give effect to the intention of the parties. Nor do we see any difference for this purpose in the meaning of the expressions, ‘commit suicide,’ ‘take his own life,’ or ‘die by his own hands.’ With either expression, it is not claimed that accidental self-destruction, death in endeavoring to escape from the flames, or the like, is within the proviso. The judgment must be affirmed.”¹

§ 321. In the *Equitable Life Assurance Society v. Paterson*,² the insured had taken laudanum while drunk. The plaintiff claimed that it was by mistake, and the court said there must be an intent to commit suicide, and if the intent exists, the fact that the man is maudlin from drink, and could have no very intelligent conception of his surroundings, does not help the case. Death from laudanum, taken by a drunken man with the intent to destroy life, would be “dying by his own hands.” And in *Fowler v. Mutual Life Insurance Company*,³ the facts showed such a case of deliberate suicide that the court refused to allow the question of insanity, or of voluntary or involuntary suicide, to go to the jury, and directed a verdict for the defendant.

§ 322. **Suicide — Sane or Insane.** — An attempt was apparently made to avoid the perplexities of the difficult question by a

¹ Mr. Justice Strong dissenting.

² 41 Ga. 338; s. c. 5 Am. Rep. 535.

³ 4 Lansing (N. Y.), 202.

provision that "if the insured shall die by his own hand, sane or insane," the policy should be void, which was the case in *De Gogorza v. Knickerbocker Life Insurance Company*,¹—not, however, with entire success. The insured died from a pistol-shot wound received from the discharge of a pistol while in his own hand; and the judge charged the jury that if the death was caused by an accidental explosion of the pistol, or if, at the time of the explosion, the mental condition of the insured was such that the act was not a voluntary act of his own will, in either case the company was liable. The jury found that at the time of his death the insured was not a responsible being, and that the act was not a voluntary one, and the plaintiff had judgment. On appeal, it was held that this was right, the court observing that, in *Breasted v. Farmers' Loan and Trust Company*,² the words in the policy were similar to those in the case under consideration, except that the words "sane or insane" were omitted from that policy; and it was there held that the words "death by his own hand" had reference to criminal self-destruction, and that a death by accident, and one by the party's own hand, stand on principle in the same category. The introduction of the words "sane or insane" in the policy, it was held, could have no further effect than to make the policy void, if the insured intended self-destruction while in a state of insanity.

§ 323. **Suicide in a Fit of Insanity does not avoid a Policy unless Death by Suicide be excepted from the Risk — Express Agreement to insure against voluntary Suicide void as against public Policy.** — Suicide in a fit of temporary insanity does not avoid a policy which does not contain an express provision that death by such means shall avoid it.³

"It appears to me clear," says Wood, V. C., in the case just cited, "that where there is no express provision in the policy; that in the event of the insured dying by his own hand the policy shall become void, that policy is not vacated by the circumstance of his having died by his own hand while in a

¹ New York Supreme Court, 2d Dept., Alb. L. J., July 7, 1873.

² 4 Seld. (N. Y.) 299.

³ *Horn v. The Anglo-Australian and Universal Family Life Ass. Co.*, 7 Jur. N. S. 673.

state of temporary insanity. It was held by the House of Lords, in *Fauntleroy's case*,¹ that it would be contrary to public policy to insure a man a benefit upon his dying by the hands of public justice; and as it would be contrary to the policy of the law for any such express contract to be made, so no contract could be implied in the policy to pay the amount in such an event; and accordingly, although nothing was said in the policy, one way or the other, the law would infer as a condition that the execution of the insured, in consequence of a crime committed by him, was not one of the cases in respect of which the policy would become payable. So the argument might be pursued, although I do not know that any case has so decided, to the same extent, in the case of a person committing suicide while in a sane state of mind, thus committing a felony, and losing his life thereby; but I know of no rule of law that can justify me in extending that to the case of a person committing suicide while in a state of insanity, and therefore committing no legal offence."

That such an agreement is void as against public policy, was also the opinion of Lord Campbell, as expressed by him in *Moore v. Woolsey*.² So the owner of a ship, who insures her for a year, cannot recover upon the policy if, within the year, he causes her to be sunk. And such no doubt would be the case where the plaintiff claims under a policy on the life of a person whose death he has caused;³ so, if the insured set fire to his own house.⁴

Perhaps there may be something in the distinction between a sane and an insane suicide under such a policy. And it has been said, in this country, in a case where the suicide was by taking arsenic, and no question of insanity was raised, that a man who commits suicide is guilty of such a fraud upon the insurers, that for that reason alone he cannot recover, even though there be no such condition in the policy.⁵ But the

¹ *The Amicable Insurance Society v. Bolland*, 2 Dow & C. 1; s. c. 4 Bligh, N. S. 194.

² 4 E. & B. 243; s. c. 28 Eng. L. & Eq. 248.

³ *Reed v. Royal Exch. Ass. Co.*, Peake's Add. Cas. 70.

⁴ *Washington Ins. Co. v. Wilson*, 7 Wis. 169.

⁵ *Hartman v. Keystone Ins. Co.*, 21 Penn. St. 466.

case did not require the decision of this point. And in *Dormay v. Borradaile*,¹ the question being upon a covenant in a marriage settlement to keep a policy alive, and whether suicide was a violation of that covenant, it was held that it was not. The covenant was "to do and perform all such acts, matters, and things as shall be requisite for continuing and keeping on foot a policy," and it was held not the equivalent of a covenant not to do any thing whereby the policy should become forfeited; and a suicide (the same as in *Borradaile v. Hunter*) who drowned himself, voluntarily and intending it, though found by the jury not to be at the time capable of distinguishing between right and wrong, was held not to have violated his covenant.

§ 324. **Bona fide Holder for Value** may however be protected by express Contract. — To a life policy which provided that if the party die by his own hands the policy should be void except to the extent of any *bona fide* interest which a third person might have acquired, it was objected that the exception was an incentive to suicide, and therefore the policy was void as against the policy of the law. But the court thought that, though a stipulation that the policy should be paid in case of suicide of the insured would be obnoxious to that objection, yet a stipulation that if the policy should be assigned *bona fide*, for a valuable consideration, or a lien upon it should afterwards be acquired *bona fide*, for valuable consideration, it might be enforced for the benefit of others, whatever be the means by which death is occasioned, was not open to the objection. That such stipulation may promote evil by leading to suicide is too remote and improbable a contingency to be allowed to counterbalance the many obvious advantages which would result from holding the stipulation valid.² But an assignee in bankruptcy is not such a *bona fide* holder for valuable consideration. He is an assignee by operation of law and not by contract.³ So where there is a condition in a life policy that in the event

¹ 10 Beav. 335.

² Per Lord Campbell, *Moore v. Woolsey*, 28 Eng. L. & Eq. 248; s. c. 4 E. & B. 248; *White v. British Empire Mut. Life Ass. Co.*, 7 Law Rep. Eq. 394.

³ *Jackson v. Foster*, 1 El. & El. 463.

of the assured dying by his own hand the policy shall be void, except to the extent of any *bona fide* interest, which, at the time of his death, shall be vested in any other person or persons for his or their own benefit, the exception applies as much when that interest is vested in the assurers themselves as when it is vested in a third party.

Therefore, where one White effected a policy of assurance upon his life, with the above condition and exception, and deposited the same with the assurers by way of collateral security for a loan from them to him, it was held that, notwithstanding the suicide of the assured, the policy was good to the extent of the debt for which it was held as security, and therefore that the debt was extinguished by the moneys which became payable under the policy.¹

§ 325. **Presumption against Suicide when the Death may have been from Suicide or by Accident — Evidence.** — When the dead body of the insured is found under such circumstances and with such injuries that the death may have resulted from accident or suicide, the presumption is against suicide, as contrary to the general conduct of mankind, a gross moral turpitude, not to be presumed in a sane man.² Where the question arises whether the death is by suicide, evidence that the deceased was an infidel or an atheist is inadmissible as affording an inference of greater probability of suicide. The inference of one fact from the proof of the existence of another depends upon the observed connection of the two in the relation of antecedent and consequent, a relation which, so far as the two facts in question are concerned, is so entirely unsupported by experience and observation as to belong rather to the domain of conjecture than of proof.³ Of course the burden is upon the party alleging insanity to prove it.⁴ The opinion of

¹ 38 L. J. N. S. Ch. 53; *The Solicitors' and General Life Ass. Co. v. Lamb*, 1 Hem. & M. 716; affirmed on appeal, 2 De Gex, J. & S. 251; s. c. 33 Law J. Rep. N. S. Ch. 426; *Dufaur v. The Professional Life Ass. Co.*, 25 Beav. 599; s. c. 27 Law J. Rep. N. S. Ch. 817; *Jones v. The Consolidated Investment and Ass. Co.*, 26 Beav. 256; s. c. 28 Law J. Rep. N. S. Ch. 66.

² *Mallory v. Travellers' Ins. Co.*, N. Y. Ct. App., 47 N. Y. 52.

³ *Gibson v. American Mut. Life Ins. Co.*, 37 N. Y. (10 Tiff.) 580.

⁴ *Terry v. Life Ins. Co.*, *ante*, §§ 319, 320.

unprofessional witnesses as to whether a person under a given state of facts, if sane, would have taken his own life, is not competent evidence.¹ Nor is evidence of a current rumor to show the probable motive of an act, as of suicide, admissible, unless it be shown that the rumor was known to the party before he committed the act.²

¹ St. Louis Mut. Life Ins. Co. v. Graves, 6 Bush (Ky.), 268.

² Ibid.

CHAPTER XIV.

OF THE SPECIAL PROVISIONS OF THE CONTRACT (*continued*).

§ 326. **Death by the Hands of Justice.**— Usually associated with the exception of liability for death by suicide is that of “death by the hands of justice.” This is defined by Tindal, C. J., as dying in “consequence of a felony previously committed.”¹ It is death under and by virtue of a judicial sentence for some crime, and not merely a rightful killing, as in case of a runaway slave shot by a patrolman who was attempting to apprehend him, as it was his legal right and duty to do.² Death under such circumstances is not “by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped authority, or by the hands of justice.”³

An exception of liability in case of “death by the hands of justice” has been held to be unnecessary, as it is against public policy to insure against the consequences of a capital felony; and such a risk could not be covered by the policy even if expressly agreed upon. As the law will not permit an express stipulation that a man shall derive pecuniary benefit upon his dying by the hands of public justice, as against public policy, it will not imply any such stipulation. Death, therefore, at the hands of public justice works a forfeiture of all right to indemnity under a policy, whether it does or does not contain such stipulation.⁴

§ 327. **Death in known Violation of Law.**— Another exception from liability is that of “death in the known violation of law,” and what constitutes “death in the known violation of law” has been the subject of considerable discussion; but

¹ *Borradaile v. Hunter*, 5 M. & G. 639.

² *Spruill v. North Carolina Mut. Life Ins. Co.*, 1 Jones (N. C.), Law, 126.

³ *Ibid.*

⁴ *The Amicable Ins. Soc. v. Bolland*, 2 Dow & C. 1; s. c. 4 Bligh, n. s. 194, overruling s. c. 3 Russ. 350.

it cannot be said that the law is settled upon this point. In *Harper v. Phoenix Insurance Company*,¹ the question arose whether killing in self-defence was within the proviso; but as the facts found and reported did not fully present this case it was sent back for a new trial, when the facts were agreed; and these, with the opinion of the court thereon, we give *in extenso*:—

“On the 6th day of February, 1850, and in the year within the time for which the life of said Edmund Harper was insured, one Coryell was talking to a man named Wilson, standing about forty paces from B. Harper’s store, where the said Edmund Harper, the deceased, then was. The deceased spoke to the said Wilson, and asked him if he knew to whom he was speaking, and admonished him to keep his hand on his pocket. Coryell then approached the deceased, and inquired if that insult was intended for him. The deceased replied that it was. The parties quarrelled, the deceased drew a pistol with a single barrel and snapped it at Coryell, who thereupon drew a revolver and advanced upon the deceased, standing on the sill of B. Harper’s store door, who threw his pistol, which had missed fire, and struck Coryell. The deceased then stepped into the store of B. Harper, and said Coryell, standing in the door of said store, with his revolver shot at and missed said deceased, who was inside the store, and eight or ten feet from the door. The deceased then retreated precipitately behind an offset formed by a stairway, six or eight feet, and picked up a stick of wood, and raised it in a threatening position over his head, but did not advance upon said Coryell, nor attempt to use said stick in any other manner. Coryell then fired again with his revolver, and shot the deceased through his body, of which he died in a few minutes. The whole difficulty was one continuous quarrel.

“Upon these facts the court found for the defendant, whereupon the plaintiff sued out this writ of error:—

“1. In the construction of the contract which has given rise to this controversy, we are not authorized to be influenced by any considerations affecting the preservation of the peace and

¹ 18 Mo. 109.

order of society, or of the morals of the party insured. Whilst the law will not countenance contracts against its policy, it does not look for a support to itself in the stipulations of men. In life policies the insurer has a guaranty against increasing the risk insured, by that love of life which nature has implanted in every creature. In such policies, unless it is otherwise stipulated, the insurer takes the subject insured with his flesh, blood, and passions. The dangers to which the lives of men are exposed from sudden ebullitions of feeling are a lawful matter of insurance.

“When this cause was formerly here, the idea intended to be conveyed in the opinion given was that a person could not be said to have died in the known violation of a law of this State, when a crime attached to the individual by whom he was slain. It was not supposed that therefore it followed that in all cases when the killing was without crime, that the person slain died in the known violation of the law. We see no reason to change the opinion then hazarded. Although conditions in policies, similar to that now under consideration, are not unusual, we have not been enabled to find any case in which its interpretation has come up for adjudication. We must then, as in all other cases involving the construction of contracts, look to the intent of the parties, as gathered from the instrument embodying their minds. It is obvious that, in giving the words of the condition a literal meaning, cases will be embraced which no one will maintain were in the contemplation of the parties. If the person whose life is insured uses offensive language to one whilst they are engaged in an unlawful game of chance, which language is concerning the game, and he is shot down for the provocation, it would not be maintained that he died in the known violation of a law of the land, within the meaning of the contract. So if he is riding a race in a public highway, which is forbidden, and his horse falls, and he is thrown and his neck broken, he does not die in the known violation of a law of the land, within the meaning of the terms of the condition. So, also, in a quarrel, if he assails another with his open hand, and is thereupon instantly shot down, he does not die in the known violation of a law within the intent of the policy.

Many similar instances might be put, which, it is clear, were not within the meaning of the parties, and if they were, the contract would be much narrowed in its operation. If, then, the literal sense of the words of the policy leads to conclusions which are inadmissible, we are necessarily driven to some other mode in order to ascertain the meaning of the parties. In the interpretation of contracts of insurance, the maxim *noscitur a sociis* obtains. When a clause stands with others, its sense may be gathered from those which immediately precede and follow it. The clause in the policy which immediately goes before that under consideration is, 'If the party shall die by the hands of justice.' Now, do not these words clearly indicate the idea in the minds of the parties at the time? Do they not show that it was a justifiable killing? There are other modes of killing justifiable than by the hands of justice. Dying by the hands of justice means dying by the execution of the sentence of law. The fourth section of the second article of the act concerning crimes and punishments enumerates many instances of justifiable homicide. These are, in resisting any attempt to murder or to commit any felony on the person or in a dwelling-house; in a lawful defence of the person, where there is reasonable cause to apprehend a design to commit a felony; when necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot or insurrection, or in lawfully keeping or preserving the peace.

"Here are abundant instances in which the words of the condition can have play, without resorting to a latitude of construction which so extends its sense as to embrace cases which were never in the contemplation of the parties.

"As there was but one mode of justifiable killing expressed, it was necessary to use general words to include all other modes of such killing, as they were equally within the meaning of the contract. The other clause in the condition is that if the party shall die in consequence of a duel.

"If a man falls in a duel, his slayer is guilty of murder. A duel is a deliberate act, and the parties voluntarily, in violation of law, expose themselves to death. The kindred clauses of

the condition thus show that a dying in consequence of a felony in the very act or course of being committed by the insured, and a dying in consequence of a felony previously committed by him, were in the contemplation of the parties. Now it would seem that, upon the acknowledged rule of construction, *noscitur a sociis*, the last clause in the condition being left in doubt as to its meaning, should be construed only to extend to instances in which the party died in the commission of a felony.

“It has been shown that a literal interpretation of this clause would embrace cases not within the intention of the parties. Now the words of the condition are the words not of the assured, but of the insurers, introduced by themselves for the purpose of their own exemption and protection from liability; both in reason and justice, therefore, no less than upon acknowledged principles of legal construction, they are to be taken most strongly against those that speak the words, and most favorably for the other party; for it is no more than justice that if the words are ambiguous, he whose meaning they are intended to express, and not the other party, should suffer by the ambiguity.¹ The facts of this case clearly show that the person slaying Harper was guilty of a crime. There is no proof of the fact set up as a bar that Coryell slew Harper in self-defence. Harper had abandoned the conflict, retreated as far as possible, and endeavored to screen himself from the attack of his assailant. His having a stick of wood in his hand at the time he was slain did not, in the least, extenuate the guilt of Coryell.

“Under the circumstances Harper would have been justified had he slain Coryell. This is made so by our statute. He would have been excused by the common law. If A. upon a sudden quarrel assaults B. first, and upon B.’s returning the assault A. really and *bona fide* flees, and, being driven to the wall, turns again upon B. and kills him, this is *se defendendo*.² By the twelfth section of the second asticle of the act concerning crimes and punishments, it is enacted that every person

¹ 5 M. & G. (See note *sub fin.*)

² 1 Hale, 480; Foster, 273.

who shall unnecessarily kill another, either while resisting an attempt by such other person to commit any felony or do any other unlawful act, after such attempt shall have failed, shall be deemed guilty of manslaughter in the second degree. Now if one dies under circumstances which would justify him in slaying his adversary, and when the person causing his death is thereby guilty of a felony, is it not a gross perversion of language to say that the person died in the known violation of a law of the land ? ”

And the reasoning of this case and the conclusion were adopted and affirmed in the same court in *Overton v. St. Louis Mutual Life Insurance Company*,¹ where the death happened in the course of a street fight between the insured and an assailant.

§ 328. In a late case in Massachusetts,² in which it appeared that the insured was killed in an altercation, brought on by an attempt on his part to unhitch a pair of horses attached to the wagon of another, who, the insured alleged, owed him a bill, and while the insured was proceeding to take possession of the horses, as a means of enforcing the payment of the bill alleged to be due him, when he was shot by the driver of the horses, the court held, on a question as to whether there was evidence for a jury, that if the insured when he was shot, was engaged in a criminal violation of law (of which there was evidence to go to a jury), known by him to be so, and if such violation of law might have been reasonably expected to expose him to violence which might endanger life, the case was within the exception. The same case was again before the court,³ when the court, by Foster, J., took occasion to state its views more at large : —

“ In the opinion of the court, the condition that the policy should be null and void, among other grounds, in case the insured should die ‘ by the hands of justice, or in the known violation of any law ’ of the State or country where he resided, or which he was permitted to visit, must be construed to refer

¹ 39 Mo. 122.

² *Cluff v. Mut. Ben. Life Ins. Co.*, 13 Allen (Mass.), 308.

³ Reported *ut supra*.

to a voluntary criminal act on the part of the insured, known by him at the time to be a crime against the law of such State or country. Applying the maxim *noscitur a sociis*, and remembering that such a clause ought not to be so interpreted as to work a forfeiture unless that intention is apparent, as well as from the natural import of the words 'known violation of law,' we conclude that they do not extend to mere trespasses against property or other infringements of civil laws to which no criminal consequences are attached. The forcible taking of the horses from Cox, if done under an honest claim of right, however ill-founded, would not constitute the crime of robbery or larceny; because where a party sincerely, although erroneously, believes that he is legally justified in taking property, he is not guilty of the felonious intent which is an essential ingredient of these crimes. Neither does the taking of horses from a vehicle to which they are harnessed amount to an assault upon the driver, unless accompanied by violence or threats of violence against him. An assault is an intentional attempt by force to injure the person of another.¹ A battery is committed whenever the menaced violence of an assault is done in the least degree to the person. Either an assault or battery would be a crime within the condition of the policy, unless justified as a measure of necessary self-defence.

"Assuming that Cluff did commit a criminal assault, it may not necessarily follow that he died in the known violation of law. If he was shot while the assault continued, such would be the case. But if it had ceased, and Cluff was not threatening to renew it, and Cox had withdrawn out of his reach and then shot him, not in the course of the affray, but merely to revenge himself for what had been done, or to prevent the seizure of the horses, then at the time he was killed Cluff was not engaged in a known violation of the law, within the meaning of the policy. For he must have received the mortal wound during and while engaged in the commission of a crime, not merely in consequence of it afterwards. But the jury, upon all the evidence, should consider whether, if he is proved to their satisfaction to have been once engaged in a criminal

¹ Commonwealth v. Ordway, 12 Cush. 270.

assault, he can be deemed to have desisted from it, while persisting continuously in the very act in the course of which the affray occurred. Their attention should be called distinctly to the question whether, if Cluff had committed a criminal assault, it was so far ended when he was fired upon that the fatal shot is to be regarded as a new and independent event, rather than a mere continuation of the original affray. If Cluff committed a criminal assault on Cox, which the latter immediately returned by a fatal blow, then the death would have been occasioned in a known violation of law, although the jury might believe that Cluff was not at the moment intending to commit any further assault. The question to be considered is, were the two acts — the assault by Cluff and the firing of the pistol by Cox — a part of one conflict for the possession of the horses, or had Cox abandoned his attempt to regain the custody of the horses, and had Cluff desisted from his assault? Was the fight over, or had Cox merely retired to a more advantageous position? In short, if Cluff in the first instance did commit a criminal assault, and the firing of the pistol was a part of the same continuous transaction, then the condition of the policy was violated. It must also appear that the death was caused or occasioned by, or resulted from, the criminal act. The loss of life must be connected with the crime as its consequence. By reason of the guilty act the death must have occurred, so that without its commission it would not have taken place. In the opinion of a majority of the court it is not, however, essential that the deceased should have known, or have had reason to believe, that his criminal act would or might expose his life to danger. The fact that the crime actually did produce the death is sufficient to avoid the policy, without regard to the probability that such a result would ensue."

And to this extent the ruling of the court, when it first came before them, and not then requiring any more explicit ruling upon this point, was modified in the second consideration of the case. On exceptions after a third trial, it was held that the honest belief in the right to do the act, while doing which the insured was shot, must be a belief in his legal right to do

the acts, and not a mere belief in the right of self-redress on account of the disturbed condition of the country, the inefficient administration of the laws, or otherwise.¹

§ 329. In *Bradley v. Mutual Benefit Life Insurance Company*,² which was an action upon substantially the same form of policy, and upon the same life, the views of the court were substantially in accordance with those of the Supreme Court of Massachusetts, except upon the point that the violation of law must be a criminal act. Upon this point the Supreme Court held that any act in violation of law which would naturally lead to a conflict by which the life of the insured would be endangered would come within the exception. But the case was sent back on another point, and the question is still an open one in New York.³ The majority of the Court of Appeals seem to have been inclined to take the same view of the import of the proviso as had already been taken by the Supreme Court of Massachusetts and Missouri; while the minority held that the proviso embraced the violation of any law when the violation was of such a character as to tend directly to endanger life. The argument in favor of this view is well stated by Mr. Justice Grover in his dissenting opinion, who, after stating the doctrine as held by the Massachusetts Supreme Court, thus proceeds:—

“This was so held . . . upon an application of the maxim *noscitur a sociis*. How this maxim can apply to the present case, or, if applied, how the conclusion deduced by the court therefrom follows, I am unable to perceive. Among the associates is that of the death happening by reason of intemperance from the use of intoxicating liquors. It is obvious, that, if the death happened from this cause, the case would come within the proviso whether such use of intoxicating liquors was prohibited by the criminal law of the State where it oc-

¹ 99 Mass. 317.

² 3 Lansing (N. Y.), 341; s. c. in the Court of Appeals, 45 N. Y. (6 Hand) 422.

³ The proviso excepted liability from death “in case the insured shall die by his own hand, or in consequence of a duel, or by reason of intemperance from the use of intoxicating liquors, or by the hands of justice, or in the known violation of law of these States or of the United States.”

curred or not; applying the maxim to this, it might with equal propriety be argued that it was not the criminal law that was had in view by the parties, as that it was such law, because death by the hands of justice is also included by the same proviso. To arrive at the intention of the parties to the contract we must consider the subject-matter in reference to which the language was used. What was the risk to be incurred by the defendant in insuring the life of Cluff? From the policy it appears that the defendant was willing to assume all the general risks to be incurred by such insurance to the extent of the amount insured. From the proviso it appears that the defendant was unwilling to incur, and therefore refused to assume the additional risks to his life incurred while the assured was engaged in the prohibited acts specified in the proviso, and therefore carefully provided that it should not be liable in case of death while engaged in the prohibited acts. Keeping these considerations in view, there will be but little difficulty in arriving at the intention of the parties, and, consequently, at the correct construction of the proviso. It is obvious that the violation of law in which the insured is engaged, whether such law be criminal or civil, must have some connection with the death, as cause and effect,—not necessarily the immediate cause, as it is sufficient if it puts in operation that cause. To illustrate: The sale of lottery-tickets is prohibited by the criminal law of New York. No one would contend that had the assured died in the State of New York from heart disease, while engaged in selling lottery-tickets, the case would have come within the proviso. It might have been within the strict letter, but not at all within the intention of the parties, for the reason that the violation of law, although criminal, had no possible connection with the death, and in no possible way increased the risk. Again, the criminal law of New York prohibits profane cursing and swearing. Suppose the death happened from some accident while the assured was violating the law, would this bring the case within the proviso? Clearly not, for the reasons above stated. Again, suppose the death occurred from injury received while the assured was attempting to obtain, by force, the possession of a chattel of

which another was in peaceable possession, the title to which was claimed by both, but which was really in the assured, the case would come within the proviso, for the reason that the risk was increased and the death caused by the violation of law by the assured, although such law was the civil law only, the deceased having committed no breach of the peace or any indictable offence. The Massachusetts court held in the same case, when again before it,¹ that the case would have come within the proviso had the assured at the time of being shot, in furtherance of his attempt to get the horses from Cox, been committing an assault and battery upon him. The court, I think, must have overlooked the fact that the violation of law in which the insured was engaged was eminently calculated to cause violence dangerous to his life to be inflicted upon him, and that the very object of the proviso was to exonerate the defendant from liability should death incur from this voluntary increase of risk. It follows that when the death occurs during the known violation of law by the assured, when such violation eminently tends to violence dangerous to life, the case comes within the proviso."

§ 330. **Death by Violence covered by Policy unless expressly excepted.**—A life policy covers death by violence in whatever form, as well as from natural causes, unless the particular form of violence is an expressly excepted cause.²

§ 331. **Violation of Law—Evidence.**—All the authorities agree that unless it appear to the contrary, the criminal laws of all civilized countries will be presumed to be the same as those having jurisdiction of the case.³

§ 332. **Military Service—Death by Casualty or Consequence of War—Belligerent Forces—Permit.**—The force and effect of the not uncommon exemption from liability if the insured shall enter into the military service, and the scope of a permit to disregard the condition of the policy against residing be-

¹ 99 Mass. 318.

² *Spruill v. North Carolina Mut. Life Ins. Co.*, 1 Jones (N. C.), Law, 126.

³ *Cluff v. Mut. Ben. Life Ins. Co.*, 13 Allen (Mass.), 308; *Arago v. Currel*, 1 La. 523; *Savage v. O'Neil*, 42 Barb. (N. Y.) 374; *Holmes v. Boughton*, 10 Wend. (N. Y.) 75; *Bradley v. Mut. Ben. Life Ins. Co.*, 3 Lansing (N. Y.), 341; s. c. 45 N. Y. 422.

yond a certain degree of latitude, were considered in *Welts v. Connecticut Mutual Life Insurance Company*,¹ where it was held that death from a roving band of banditti, thieves, and robbers, such as usually disturb communities during insurrectionary periods, is not one of the "casualties or consequences of war or rebellion," nor is it a death from "belligerent forces." And it was also held that under a permit to reside in a district known to be in a state of war, when hostile armies are contending for its possession, subject to the stipulation that the insurers shall not be liable on account of a death happening from such casualties or forces, a condition in the policy against entering military service is so far modified that the insured may engage in the incidental service of bridge building, not in the vicinity of any hostile force, without prejudice to his right to recover under the policy. The facts in the case, and the conclusions of the court thereon, are thus stated by Smith, J. : —

"By this permit *Welts* was permitted to pass, by the usual route and means of public travel, to any part of the United States south of the thirty-sixth degree of north latitude, and reside there, or return, during the term of one year from the date of such permit, without prejudice to said policy ; provided, and the said permit was issued with the understanding and agreement of the parties in interest, 'that the said *Welts* was not insured by said policy against death from any of the casualties or consequences of the war or rebellion, or from belligerent forces, in any place where he may be.' If this permit had not been given when all that part of the United States south of the thirty-sixth degree of north latitude was in a state of insurrection and war, and covered more or less with hostile armies, I should have considered that *Welts* came to his death from the causes covered by the proviso, and excepted from the policy. But he was permitted to go into any or all the insurrectionary States south of the line of the thirty-sixth degree of north latitude ; the insurers well knowing, as well as the assured, of the existence of the war of the rebellion in all of these States. The assured paid an extra premium for such

¹ 46 Barb. (N. Y.) 412.

permit. He was killed where, under the permit, he had a right to be; he was not killed by rebels in any encounter of arms; he was engaged in no battle, or near any; he was twenty miles or more in the rear of the United States forces at Nashville, and it does not appear that there was any rebel force at the time north of the Cumberland; he was not exposed to any war peril, except such as existed through all the peaceful parts of Kentucky and Tennessee. Having the right to be in the place in which he was killed, the risk Welts then run was one covered by the permit. He was engaged in no war-like enterprise. He was simply rebuilding railroad bridges far in the rear of, and away from any hostile forces. The band by which he was killed were, it seems, mere roving robbers, robbing union men and rebels alike. They did not interfere with the work in which Welts was engaged. They did not destroy railroads or bridges, or make prisoners of any persons in Welts' company, or others. They merely robbed the members of the company of their money, making no demonstrations indicating that they were confederate soldiers, or acting in the interest of the rebel government. It is true that Welts ran the peril of encountering such robbers by going into Tennessee, but this, I think, was part of the risk contemplated by the permit. The same peril would have been encountered if he had been traveling quietly in that section of country, simply passing from one place to another in any part of the United States south of the line of thirty-six degrees of north latitude.

"This permit is to be construed with reference to the known condition of the country at the time it was given, and the parties must both be deemed to have known what the ordinary perils were in the country where the insured proposed to go, and their contract must be interpreted in the light of this assumption."

And this case was affirmed by the Commission of Appeals,¹ the court observing, amongst other things, "that the general understanding of the term includes such persons only as are liable to do duty in the field as combatants."

§ 333. **Military Service** — What constitutes entering. — In

¹ 48 N. Y. 34.

Mitchell v. Mutual Life Insurance Company of New York,¹ it appeared that the insured went South after the breaking out of the rebellion, and served on the staff of several generals, though he received no commission. And the court thought that if the insured connected himself in any form with the beligerent force, whether he had a commission or not, he entered the military service, within the meaning of the policy.

§ 334. **Military Service — Voluntary or Involuntary.** — In *Dillard v. Manhattan Life Insurance Company*,² the insured, threatened with conscription, entered the Confederate service, and occupied the position of brigade-post-quartermaster. It was claimed by the plaintiff that this was substantially an involuntary entering the service on the part of the insured, and if not, was for the benefit of the insurers, as the risk was less than it would have been to take the chances of compulsory service through conscription. But the court did not sustain these views.

§ 335. **Restrictions upon Residence — License to travel.** — When, by the terms of the policy, the residence of the insured is restricted within certain specified limits, and a license is given to remain without those limits till a certain period, inability by reason of sickness and death to return within the time stated in the license will not work a forfeiture, as the assured is excused on account of his inability, which is the act of God. This was so held in *Baldwin v. New York Life Insurance Company*,³ for reasons thus stated by Bosworth, C. J. : —

“James J. Baldwin, the insured, was taken sick at Appalachicola, in Florida, on the 11th of June, 1854. If he had died there before the tenth of the following July, of the disease with which he was attacked on the 11th of June, the defendants would be liable on the policy. So, too, if he had started north in time, and so as to have passed north of the south bounds of Virginia by the 10th of July, and had died north of such bounds on the 11th of July, the insurers, on the principles contended for by them on the argument before us, would have been liable, even though such a journey performed

¹ Decided in the Superior Court of Baltimore, and cited by Bliss, Ins. 643.

² 44 Ga. 119.

³ 3 Bosw. (N. Y. Superior Ct.) 530.

under such circumstances diminished the insured's chance of recovery.

"Under this construction of the license granted to the insured, the latter, in order to keep the policy in force, if taken sick in Florida on the 11th of June, must start north, at whatever peril to his life, in time to be and succeed in being north of the south bounds of Virginia, a living man, by the 10th of July. If he does not, this policy would become void. And this consequence follows, although there be the highest moral certainty that if he performs the journey his disease will be thereby so aggravated that his death will be inevitable, and the company made liable to pay the sum insured. Hence, if that is the proper construction of the license or consent, the insured, if taken suddenly ill, when he has five times as long a period remaining as is ordinarily required to perform the journey, must, although there may be a reasonable prospect of his restoration to health by a day subsequent to the 10th of July, if he continue where he is, either forfeit his policy if he remains there, or earn the sum insured by terminating his life before the 10th of July south of the south bounds of Virginia, or north of them immediately thereafter, by reason of the rash and hazardous attempt to perform such journey.

"In other words, under such a state of facts as the evidence in this case established, in order to keep the policy in force, the insured must do acts which will unavoidably subject the insurers to a loss of the sum insured, and thus literally 'die by his own hand,' in which event the policy, by its terms, becomes void.

"If the insured, when taken sick, had been north of the south bounds of Virginia, but absent from his home, and the nature of his disease and its aggravated condition were such at the time as in the judgment of those conversant with such subjects death would inevitably ensue if he should attempt to journey home, while his recovery would be in the highest degree probable if he continued where he was and submitted to the regimen prescribed by competent professional advisers, and he should nevertheless, against such advice, persist in the attempt to journey home, and by reason of it should die on

the way, his conduct would fall within the spirit of the condition last referred to, though it might not within the letter of it, as it has been judicially interpreted.¹

“On such a state of facts it would be difficult to say that the death of the insured was not caused by his own default or neglect.

“As the policy in question is one upon the life of the deceased, I think the terms of the license or consent should be so construed as not to require him to attempt to return north of the south bounds of Virginia by the 10th of July, when, in consequence of sickness suddenly and unexpectedly contracted or developed, an attempt to do so would be certain, so far as the human mind can foresee results, to produce the death of the insured.

“By the ordinary route and mode of travel he could have passed from the place where he was taken sick, north of these bounds, in six days. Excluding the 11th of June, on which day he was taken sick, and the 10th of July following, there were twenty-eight days remaining.

“He was taken and became ‘so sick and ill in body as to be unfit and unable to travel, and to start on his return home,’ and continued so until he died.

“I do not think the consent or license should be so construed as to require him to start in that condition, with the certainty that, if he did start, he would die in consequence of his sickness and of such acts on his part south of the south bounds of Virginia before the 10th of July, or north of those bounds immediately thereafter.

“That it could not have been the intention of the parties to this contract that the insured, under the state of facts established by the special verdict, should do acts which would make his own death inevitable, in order to a proper performance, on his part, of his duty as prescribed or declared in such license or consent.

“That, by a just construction of the policy, he was insured against death resulting from a disease contracted or first devel-

¹ *Breasted v. The Farmers' Loan and Trust Company*, 4 Seld. 299; *Parsons' Merc. Law*, 544, note 1.

oped on the 11th of June, 1854, at the place where he then was, if the disease was of a character that his death was in the highest degree probable if he attempted to travel.

“And that his being north of the south bounds of Virginia by the 10th of July, 1854, is not a condition precedent to the right to maintain an action upon the policy in case of his death in such sense that, if in consequence of sickness discovered on the 11th of June (at a distance from such bounds of six days’ ordinary travel), and so severe that his death will be in the highest degree probable if he attempts to travel, the insured must endeavor to reach these bounds with the certainty that if he does, he will die before the 10th of July, and before crossing them, or as soon as he has passed north of them, either on the 10th or immediately thereafter. The consent or license should be so construed as to conform to the intent of the parties, to be collected from the terms of the whole agreement and the subject-matter to which it relates.

“I think it was the intent of the parties that the defendants should be liable in the event that has happened, and on its happening under the circumstances under which it is proved to have occurred.”¹

It was held, however, in *Howell v. Knickerbocker Life Insurance Company*,² that if payment of the premium within the time required was prevented by the act of God, as by a stroke of paralysis, it was no excuse, but a failure which works a forfeiture. And this case was affirmed in the New York Commission of Appeals.³ Stress was laid on the consideration that the payment of the premium might be done by procuration, and did not depend upon the capacity or existence of the life. This distinguishes the case in its facts, if not in principle, from the case last cited.⁴

§ 336. **Restrictions upon Residence and Travel.**—But where there was a condition that the insured should not remain more

¹ Hoffman, J., also gave an opinion to the same effect, in which the cases illustrative of the doctrine that non-performance of an obligation may be excused when it becomes impossible by the act of God, are carefully collected and stated.

² 3 Robt. (N. Y. Sup. Ct.) 232.

³ 44 N. Y. 276.

⁴ See Brown’s Leg. Max. (6th Am. ed.) 176.

than five days within certain limits, on penalty of forfeiture, and the insured remained there ten days, when he was taken sick, and died within the prohibited limits, it was held that there could be no recovery under the policy,¹ whether the violation of the condition was, or was not, in any way the cause of the death. In another case, where there was a permit to travel by one route, and the insured travelled by another, but the change had no materiality to the risk, the court were divided in opinion as to whether this would be a defence.² The indorsement upon a policy, however, of a permit which purports to grant privileges for a consideration paid therefor, which are only such as may be enjoyed under the provisions of the policy, will not restrict the rights of the insured under the policy,—rights for which he had already contracted and paid. These rights may be availed of as if no permit had been indorsed;³ and if such an indorsement be made at the time the policy is issued, it is to be regarded as part of the policy, modifying any condition to which it relates.⁴ But a permit to proceed to a particular place without the limits to which the insured is restricted by the terms of the policy, written on a receipt for the premium paid at the time of taking out the policy, is no part of the policy, but a separate and independent agreement. Such a permit authorizes the insured to go beyond the restricted limits, but not to reside there, except as allowed under the terms of the policy.⁵

§ 337. **Restrictions upon Residence and Travel — Settled Limits.**—The “settled limits” of the United States means the established boundaries of the Union, and a death beyond the region of actual settlement is covered by the policy. The word “settled” in such a case, and in its connection with the word “limits,” is equivalent to “fixed” or “established.” In the sense of occupied or inhabited, it would give rise to great, if not insurmountable difficulties of proof, and would be so vague and uncertain, that courts should not uphold such a

¹ *Nightingale v. State Mut. Life Ins. Co.*, 5 R. I. 38.

² *Bevin v. Conn. Mut. Life Ins. Co.*, 23 Conn. 244.

³ *Forbes v. American Mut. Life Ins. Co.*, 15 Gray (Mass.), 249.

⁴ *Rainsford v. Royal Ins. Co.*, 1 Jones & Spencer (N. Y. Superior Ct.), 453.

⁵ *Ibid.*

view unless upon the clearest evidence that such was the intention of the parties.¹ "The primary definition of the word 'settled,'" said Selden, J., "is fixed, placed, established. It is true it is also, though more rarely, used as descriptive of a section of country that is 'planted with inhabitants;' but it is obvious that it can never, with propriety, be used in the latter sense in connection with the word 'limits.' Limit means boundary, border, the outer line of a thing, and nothing else, except when used to convey the idea of restraint. There may be a settled region, a settled country, or a settled territory, but there can be no such thing as a settled limit, in the sense contended for." And it was held not to be susceptible of meaning "the region of settlement" as contended for by the insurers.

§ 338. **Restrictions upon Residence and Travel — Construction.** — A license or permit about which there is any ambiguity will be construed most strongly against the company. Thus a permit, setting forth that the insured is about to proceed to, and reside at, Belize, and granting liberty to reside there for one year, may be availed of for any year thereafter during the currency of the policy.² So a permission to go by sea in a first-rate vessel, is not restrictive of the mode of travel, whether by steerage or in the cabin.³ But a permit, clear in its terms, must be strictly followed, or it will afford no protection. Thus a permit to make a voyage, out and home, to California, round Cape Horn or by the way of Vera Cruz, will not authorize making the voyage by the way of Panama, though this may be the safer route.⁴ The condition remains in force in all its stringency, except so far as it may be modified by the terms of the permit.

§ 339. **Restrictions upon Residence and Travel — Waiver.** — But the right to insist upon a compliance with such restrictions may be waived; and a receipt of the premium by the

¹ *Casler v. Conn. Mut. Life Ins. Co.*, 22 N. Y. (8 Smith) 427, — Comstock, C. J., and two other judges dissenting, who held that the words were equivalent to the "region of settlement."

² *Notman v. Anchor Ass. Co.*, 4 C. B. N. s. 476.

³ *Taylor v. Aetna Life Ins. Co.*, 13 Gray (Mass.), 434.

⁴ *Hathaway v. Trenton Mut. Life Ins. Co.*, 11 Cush. (Mass.) 448.

insurers after a known violation of the condition against residence abroad, or of the terms of the permit granted, is a waiver of their right to claim a forfeiture by reason of such violation.¹ And this is true whether the knowledge be actual or constructive, as where the violation is known to the agent of the insurers who received the premium.²

¹ *Bevin v. Conn. Mut. Life Ins. Co.*, 23 Conn. 244.

² *Wing v. Harvey*, 5 De G., M. & G. 265; s. c. 27 Eng. L. & Eq. 140. And see also *Girdlestone v. N. B. Mar. Ins. Co.*, 11 L. R. (Eq.) 197.

CHAPTER XV.

OF THE SPECIAL PROVISIONS OF THE CONTRACT (*continued*).

§ 340. **Payment of the Premium.** — The premium paid is the consideration received by the insurers for the risk which they undertake. Ordinarily, therefore, and in the absence of special stipulation to the contrary, the delivery of the policy and consequent assumption of the risk, and the payment of the premium are coincident. They are the two acts on the part of the respective parties which perfect the contract and give it validity. The recital in the policy is, that the insured having paid the premium, and complied with certain other conditions, the insurers are under certain obligations to him. But it is also almost universally provided that the policy shall not take effect until the premium be paid. And in such case, until the payment of the premium, the contract will not take effect, although all the terms may have been agreed upon, and the policy made out, if not delivered;¹ nor even if delivered, if such is the intent of the parties.² So if a policy by its terms is not to cover the risk while a premium is overdue, a loss after the time when the premium is due, and before it is paid, must be borne by the insured.³

§ 341. **Premium — Non-payment — Forfeiture.** — If the policy, by its terms, is forfeitable for non-payment of premium, or any note given for a premium when due, a failure to pay at maturity a note given for a part of the premium, or any installment thereon, when due, works a like forfeiture. And the fact that no notice is given by the insurers of the time when the note becomes due, will not avail the insured, since they are

¹ *Schwartz v. Germania Life Ins. Co.*, Sup. Ct. Minn., 2 Ins. L. J. 449; *Flint v. Ohio Ins. Co.*, 8 Ohio, 501.

² *Bodine v. Exch. Fire Ins. Co.*, N. Y. Com. of App., 2 Ins. L. J. 23.

³ *Wall v. Home Ins. Co.*, 36 N. Y. 15.

under no obligation to give such notice.¹ In *Pitt v. Berkshire Life Insurance Company*,² the policy purported to be in consideration of \$86.40 to the defendants "in hand paid," and of a like sum to be annually thereafter paid, and was conditioned to be void in case the insured should fail to pay when due any notes or other obligations given for premium. In point of fact, only a part of the first premium was paid in hand in cash, and for the balance a note was given which set forth on its face that if not paid when due, the policy should be void, in accordance with the conditions of the policy. And the note being payable in instalments, and being expressed to be for the unpaid balance of the premium, it was held that the giving the note was not a payment of balance due of the premium, and that the forfeiture insured on non-payment of the instalment first due.³ An attempt was made in *Winders v. Lord Tredegar*⁴ to recover a lapsed policy, after omission to pay the annual premium, and after the insured had taken out a new policy in a new office. The original policy was issued at a time which, if it was still in force, would entitle it to certain valuable bonuses; and many years after the lapse of the policy the executors of the insured brought their bill in equity to recover the policy on the ground that it had lapsed by accident, the insured not having received the usual notice, by reason of his change of residence. But the "Master of the Rolls," the Lord Justices, and the House of Lords on appeal to them, scouted the bill.

§ 342. But when the policy is forfeitable for non-payment of the premium, but does not distinctly provide that the non-payment of a note given therefor at maturity shall work a forfeiture, as this clause is inserted for the benefit of the insurers it must be taken most strongly against them, and the non-

¹ *Robert v. The New England Mut. Life Ins. Co.*, Disney (Sup. Ct. of Cincinnati), 355, Gholson, J.; *Pitt v. Berkshire Life Ins. Co.*, 100 Mass. 500; *Caton v. American Life Ins. & Tr. Co.*, 33 N. J. 487; *Baker v. Union Life Ins. Co.*, 43 N. Y. 283, reversing s. c. 6 Robt. (N. Y. City Sup. Ct.) 393. And see *post*, § 342.

² *Ubi supra*.

³ *Pitt Adm'x v. Berkshire Life Ins. Co.*, 100 Mass. 500.

⁴ 15 L. T. N. s. 108, H. L.

payment of the note at maturity will not work a forfeiture.¹ The courts will not extend the operation of a condition, the breach of which involves a forfeiture, to a case not clearly within it. Thus, where two notes were taken, one subject to the condition, and the other not, the failure to pay the latter was held not to work a forfeiture.² And though the note itself be made payable in six months, and by the terms of the note the policy is to be void if the note be not promptly paid at maturity, it has been held that the non-payment of the note only renders the policy voidable and not void, so that the policy continues in force unless the insurers do some act to show that they insist upon the forfeiture.³ The case referred to was this : —

A mutual life insurance company insured the life of a member for a certain annual premium, to be paid at the beginning of each year, and if not so paid, the policy was to cease and determine, the insured to forfeit all moneys paid and all rights under such policy. The insured paid three annual premiums, but gave his promissory note for the next year's premium, the taking of which the company assented to, payable six months after date, bearing interest at a higher rate than the rules, &c., of the company provided for. The note provided : "Being for premium on policy No. 25,187, and if not paid at maturity, said policy is to be void." The note was not paid at maturity, nor did the company demand payment of the maker, on the day it became due, but urged payment at other times. The maker was solvent. When the next year's premium would have fallen due, by the terms of the policy, upon a tender made of it to the agent of the company, the latter refused to receive it, claiming that the risk had determined by reason of non-payment of the note, and demanded back the receipt given for the previous year's premium, but continued to hold the note. In an action brought after the death of the insured, to recover upon the policy, the action was sustained by the court. In giving its opinion the court said : —

"Now, what is the legal effect of the policy itself? It is an

¹ *McAllister v. The New England Mut. Life Ins. Co.*, 101 Mass. 558.

² *New England Mut. Life Ins. Co. v. Hasbrook*, 32 Ind. 447.

³ *Mut. Ben. Life Ins. Co. v. French*, 2 Cin. Superior Ct. Repr. 321.

agreement to insure the life of French from year to year during his life, on the payment to it each year of a certain amount of money as a premium for the risk taken. His failure to pay such premium at the beginning of each year, unless waived by the company, *ipso facto*, would cause the policy to 'cease' and determine. It was a contract that could only continue from year to year, at the *option* of the insured, who could let it drop at any time. If, on July 6, 1867, the insured had said to the company, 'I will not pay; I do not wish to insure longer in the company,' it could not have compelled him to do so; it could not have sued and recovered from him that or any subsequent year's premium. Its remedy was provided against the insured by the forfeiture of all his moneys previously paid and rights under the policy. Hence the payment of each year's premium was a *condition precedent* to the further existence of the contract.¹

"Had this note been taken in pursuance of any stipulation of the policy, or rules or laws of the company authorizing it as a method of paying the annual premium, it would then have been a condition precedent to the continuance of the policy, which would have ceased and determined, as of July 6, 1867; but if not so provided for, this would not necessarily be so.²

"Let us, then, inquire whether the note given in this case could have been sued upon and recovered by the company after it became due, or whether the maker could have successfully defended against it, on the ground that he had elected to insure no longer with the company. We think he could not. The risk for the whole year would have commenced; the policy for that year would have attached, and the company would have carried it six months and three days, liable in case of the insurer's death during the whole time. The payment of the note became a condition *subsequent*, which only the company could avail itself of. There would have been an election on the part of the insured to insure for another year,

¹ See *Mut. Ben. Life Ins. Co. v. Jarvis*, 22 Conn. 133.

² *McAllister v. New England Mut. Life Ins. Co.*, 101 Mass. 558; *Robert v. New England Mut. Life Ins. Co.*, 1 Disney, 355; s. c. 2 ib. 106, 107; *New England Mut. Life Ins. Co. v. Hasbrook*, 32 Ind. 449.

and not a refusal to do so, as if he had not attempted to pay the premium for the year, in which case there would have been no liability on his part. Such terms in the note made the policy merely *voidable* at the option of the company. Forfeitures are not favored, especially where delay can be compensated for in money.¹

“ Still the company might have forfeited the policy on non-payment of the note when it became due, but it should have exercised the right promptly. It should have demanded payment on the last day of grace, during the business hours of the day; and if such payment was not then made, it should have declared the policy forfeited or void. This is in accordance with well-settled rules for enforcing forfeitures for breaches of condition subsequent. No such demand is required in the case of the non-performance of *conditions precedent*, as the stipulation in a policy for the payment of annual premiums, though it is usual for companies to notify parties a few days in advance of the time such annual payments are to be made; but this is mere accommodation. The company, then, did not determine or make void this policy when the note fell due, and it became a mere debt, like the check given for the other half of that year's cash premium.”² And even a parol agreement to pay may be so far a payment as to prevent a forfeiture of the policy by the mere fact of non-payment.³

§ 343. If, however, the policy contains no such proviso, though the charter and by-laws require the payment of annual premiums, the non-payment of the annual premium when due does not work a forfeiture. Such a policy insures for the number of years stipulated absolutely, leaving the annual payment of the premium to be enforced, not as a condition, but as a part of the consideration agreed to be paid.⁴

§ 344. Under the following special and peculiar facts a policy was, after much fluctuation of judicial opinion, held void.

¹ Boyd v. Talbert, 12 Ohio, 212, 214; Smith v. Whitbeck, 13 Ohio St. 471.

² Mut. Ben. Life Ins. Co. v. French, 2 Cincinnati Superior Court Reporter, 321.

³ See *post*, § 346.

⁴ Woodfin v. The Asheville Mut. Ins. Co., 6 Jones (N. C.), 558.

The policy was headed as follows: "Annual premium, £33; whole term, payable by quarterly instalments of £8 5s. each." The policy was dated Aug. 2, 1856, and recited that "the assured had paid £8 5s. as the premium till 2d of November." It also stipulated that if the insured should die within twelve calendar months from the date thereof, or should live beyond such period, and should on or before that period, or before the expiration of every succeeding twelve calendar months, pay the annual amount of premium, the insurers should be liable; with a proviso, however, that if the insured should die before the whole of the quarterly payments shall become payable for the year, the directors might deduct from the sum insured the whole of the premium for that year, reckoning it to commence from the 2d of August. The insured died after the third quarterly instalment had become payable, but before it was paid, and it was held in the Queen's Bench that the non-payment of the third instalment rendered the policy void, on the ground that this was a policy from quarter to quarter, leaving to the assured liberty to drop it at the end of any quarter, and not imposing any continuing liability on the insurer, unless the quarterly payment is made at the end of the quarter; and further, that the condition as to the payment of all the quarterly premiums was a condition precedent.¹ This judgment, however, was reversed in the Exchequer Chamber,² on the ground that the insurance was an annual insurance for a year, and from year to year, time being given to pay the annual premium by quarterly instalments; and that the absence of any express promise to pay, and of any provision as to the consequence of non-payment of the quarterly premium, prevented their payment from being a condition precedent. But this judgment was again reversed in the House of Lords, on the ground that the "annual amount" of the premium had not been paid, and the proviso was not meant to apply to the case of a default of payment, but to the case where the payments had been regularly made as they became due, but when all the instalments had not become due.³

¹ E. B. & E. 156.

² Ibid. 160.

³ Phoenix Life Ins. Co. v. Sheridan, 8 H. L. Cas. 475.

§ 345. **Premium — What constitutes Payment.** — When no special mode of payment is stipulated for, any mode of payment which is accepted without objection, on the part of the insurers or their agent, will suffice. Thus, the actual delivery to the agent of a check payable to the order of the agent, or mailing such a check to his address, at his request, made at the time of the completion of the contract, is an actual payment of the premium, if the check be at the time, and afterwards, till received, continue to be good. Since no mode of payment is provided, the agent may exercise his discretion and accept any mode which suits the convenience of the parties.¹ Even a payment of the premium in depreciated funds to the local agent of a foreign insurance company, if received by him according to the usual course of his business known to his principals, is a valid payment.² And, of course, a tender of payment in a like currency would be equivalent to the actual payment in its effect upon the obligations of the policy.³ So the payment may be by note; and if the note is given and accepted as payment, it will be sufficient.⁴

§ 346. **Parol Agreement to Pay — Days of Grace.** — A parol agreement, made at the time of the annual payment of the premium, subsequent to the issue of the policy, that if any thing should happen to the insured to prevent his punctual payment of the premium, the policy should not become void, but should continue in force for a reasonable time thereafter, so that the premium could be paid, is valid, though Hunt, C., thought such an agreement could keep the policy alive upon a living subject only, and that if the insured were dead before the tender of the premium, although the tender were within a

¹ *Taylor v. Merchants' Fire Ins. Co.*, 9 How. (U. S.) 39.

² *Rob v. Int. Ass. Soc. of London*, 42 N. Y. 54; *Martine v. Same*, 62 Barb. (N. Y.) 181; *Sands v. New York Life Ins. Co.*, 50 N. Y. 626; *Polglass v. Oliver*, 2 Cr. & Jer. 14.

³ *New York Life Ins. Co. v. Clopton*, 7 Bush (Ky.), 169. See also *New York Central Ins. Co. v. Nat. Prot. Ins. Co.*, 20 Barb. (N. Y.) 469.

⁴ *Mut. Ben. Life Ins. Co. v. French*, 2 Cincinnati Superior Court Reporter, 321; *Pitt v. Berkshire Life Ins. Co.*, 100 Mass. 500. In point of fact it is customary for mutual insurance companies to accept part payment of the first as well as of subsequently accruing premiums in the form of a note. Of course such a note is, by the understanding of both parties, a payment *pro tanto*.

reasonable time, it would be ineffectual to continue the policy. And to the same effect were the observations of the court in *Baptist Church v. Brooklyn Fire Insurance Company*,¹ a case of fire insurance. "A provision in a policy already executed and delivered so as to bind the company, declaratory of a condition that premiums must be paid in advance, manifestly has no effect, except to impart convenient information to persons who may wish to be insured. As such a provision in the policy in question could have no effect upon the delivered and perfect contract in which it was contained, so it could have none to prevent the same parties from making such future contract as they please. In any subsequent agreement for a renewal or continuation of the risk, it was competent for the parties to contract by parol, and to waive the payment in cash of the premium, substituting therefor a promise to pay on demand, or at a future day. Proof of such an agreement would have no tendency to contradict or to change the written policy already in force between the parties, and which would be wholly spent before the new agreement could take its place."² But it seems that such an agreement, made at the time of issuing the policy, would not be provable as tending to contradict the terms of the policy, nor would a usage of the company known to the insured of allowing such days of grace, for the reason that it would be in plain conflict with its provisions.³ Though the contrary has been expressly held as to the proof of a usage.⁴

§ 347. Where a policy of life insurance was issued stipulating that the first year's premium was to be paid in advertising in the newspaper published by the insured, and the advertising matter was furnished by the company and duly advertised, it was held that it was incumbent upon the company to furnish sufficient amount to meet the premium, and the insured was not responsible for, and the insurance not vitiated by, a deficiency in advertising matter. It was also held that in the absence of any notice from the company to the insured that

¹ 19 N. Y. 305.

² See also *Bodine v. Exch. Fire Ins. Co.*, N. Y. Com. of App., 2 Ins. L. J. 23.

³ *Howell v. Knickerbocker Life Ins. Co.*, 44 N. Y. (Com. of App.) 279.

⁴ *Helme v. Phila. Life Ins. Co.*, 61 Penn. 107.

the policy would not take effect until the termination of the time of advertising, it took effect from its date.¹ And it seems that payment may be in board, if agreed upon by properly authorized parties.² And, doubtless, in whatever commodity may be so agreed upon.

§ 348. **Premium — Payment.** — But it has been held that a promise by the treasurer of the insurers, where the policy has been executed but not delivered, and the by-laws make prepayment essential to the validity of the policy, that he would see that the premium was paid, or that he would take it upon himself to keep the policies good, is no payment. The act of a treasurer, under such circumstances, is not that of the agent of the company, but his own act in his private capacity.³ But the courts of Massachusetts give the greatest effect to the by-laws of a mutual insurance company in restricting the powers of the officers and agents of the company.⁴ And it is doubtful if the decision above cited would meet with approbation in most of the States.⁵

§ 349. **Premium — Time of Payment — Sunday.** — Where the premium falls due on Sunday it may be paid on the following day, the rule appertaining to negotiable notes entitled to grace, that the payment must be made on the day preceding the last day of grace when that day happens on Sunday, not obtaining in other contracts, for reasons thus stated by the court in a case where the premium fell due on Sunday at noon : —

“In reference to notes payable on a certain day, but entitled to three days’ grace, it is said that in such case the note by its terms would be due and payable two days earlier than Saturday, and that what was originally a mere indulgence to casualty or oversight should not be extended, and therefore if the last of three days of grace falls on Sunday, the payment must be made on Saturday, and that it was more reasonable to take from than to add to a period of time thus originally allowed as mere grace and favor. But as to other contracts,

¹ The Kentucky Mut. Ins. Co. v. Jenks, 5 Ind. 96.

² Schwartz v. Germania Life Ins. Co., Sup. Ct. Minn., 2 Ins. L. J. 449.

³ Buffum v. Fayette Mut. Ins. Co., 3 Allen (Mass.), 360.

⁴ See *ante*, §§ 127–145.

⁵ See *ante*, § 134.

which by the face of the instrument required a payment on a day which proves to be Sunday to discharge literally the promise or duty, the law seems to sanction the postponement of the time for doing the same till the Monday following. In other words, Sunday is not a legal day for the performance of contracts and doing secular business. The statute law forbids all such acts. The party paying, and the party receiving money on that day in discharge of a contract, would subject themselves to a penalty for so doing. Sunday was not a day contemplated by the parties as embraced in the stipulation to pay a quarterly premium on the first day of October on each and every year during the life of the party assured. The defendants had no office open on that day, and were under no obligation to receive the payment of the premium on that day, if the same had been tendered by the assured. Such being the case, the assured was under no obligation to do what would have been not only an illegal act, but also one which the other party was not bound to recognize. In this view of the case there was no such default on the part of the assured in not paying the premium fully due on the first of October, as should be held to terminate the policy.¹

§ 350. **Non-payment of Premium — Excuse — Intervening War.** — But as the intervention of war cuts off all intercourse between the contracting parties, if they reside respectively with the belligerents, and neither by themselves or by their agents can they lawfully have such intercourse, it is held by the almost universal concurrence of the authorities, that a failure to pay under such circumstances does not avoid the policy. One may undertake as against his own acts and the acts of strangers, but not as against the acts of God, his own government, or of the obligee.² The last-named case, for reasons

¹ *Hammond v. The American Mut. Life Ins. Co.*, 10 Gray (Mass.), 306; *Campbell v. The International Life Ass. Soc.*, 4 Bosw. (N. Y. Sup. Ct.) 298. This case contains an elaborate *résumé* of the history of the Sunday law, so called, well worthy of perusal. A note not entitled to grace falling due on Sunday is not payable till Monday. *Salter v. Bush*, 20 Wend. (N. Y.) 205.

² See the authorities cited *ante*, §§ 36-42. And see also *Sands v. New York Life Ins. Co.*, 59 Barb. (N. Y.) 557; s. c. affirmed in the Court of Appeals, 50 N. Y. 626, and *Cohen v. Same*, 50 N. Y. 610, reversing s. c. in the Superior

stated in the opinion, was very carefully considered, and the conclusions of the court upon all the points raised were as follows:—

“A decision of this appeal has been delayed at the request of parties to other actions pending in this court, like in character in some respects to this, that before the questions involved should be decided their appeals might be heard.

“The importance of the questions at issue induced the court to listen to the request, and this case was substantially re-argued with *Sands v. The New York Life Insurance Company* in December last. The legal status of citizens of States at war, and the relation they mutually occupy, as well as the effect of a state of war upon contracts and obligations of the subjects of litigant States, and their right to contract or hold intercourse with each other, have recently been so frequently the subject of judicial discussion and decision in the State and federal courts, that the leading principles by which the intercourse and dealing between enemies—that is, between the inhabitants of States and nations at war—are prohibited, or restricted and regulated, and the effect of war upon their mutual contracts and obligations, are quite familiar. They have been so often repeated in different forms, although in substance and effect the same, that a review of them, or a reference at much length to them, would be out of place.

“The general principles and doctrines as found in the treaties of nations upon public law, and deducible from the judgments of courts, are firmly established, and cannot be ignored or essentially modified by courts at this day. All that courts have to do is to apply the principles thus recognized and settled to cases as they are. It is said, in general terms, that in a state of war ‘the individuals who compose the belligerent States exist, as to each other, in a state of utter occlusion,’ and all intercourse between them is forbidden.¹ This proposition has been repeated with approval in several later cases. Judge Nelson, in the *Prize Cases*,² adopting the language of

Court of the City of New York, cited *ante*, p. 37, both decided since those sections were printed, and both affirming the doctrine therein stated.

¹ Per Johnson, J., *The Rapid*, 3 Cranch, 155.

² 2 Black (U. S.), 635, 681.

approved writers on international law, says that one of the legal consequences resulting from a state of war is that 'the people of the two countries immediately became the enemies of each other; all intercourse, commercial or otherwise, between them, unlawful; and all contracts existing at the commencement of the war, suspended, and all made during its existence, utterly void. The insurance of enemies' property, the drawing of bills of exchange or purchase on the enemies' country, the remission of bills or money to it, are illegal and void; all existing partnerships between citizens or subjects of the two countries are dissolved; and, in fine, interdiction of trade and intercourse, direct or indirect, is absolute and complete by the mere force and effect of the war itself.¹ These propositions, general and far-reaching as they are, were, however, made in cases relating to commercial intercourse, and involved the question as to the legality and effect of commercial dealings and transactions; and the general language used in legal effects extends only to intercourse and dealings of that character, although all other intercourse clearly within the mischief intended to be avoided would be within the principle, and therefore within the rule itself.

"I do not understand that it has been authoritatively adjudged that all private contracts, without exception, made between citizens or subjects of States at war, are necessarily void, although the language of the court has been sufficiently comprehensive to include the proposition in its largest extent. The subject is elaborately and ably considered in *Kershaw v. Kelsey*; ² and the authorities, with the reason and extent of the rule under consideration, reviewed and discussed, and the result of the examination was that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between these countries. This was regarded as including every act of voluntary submission to the enemy, or receiving his protection in any act or contract which tends to increase

¹ See also *Jecker v. Montgomery*, 18 How. 110; *Hanger v. Abbott*, 6 Wall. 532; *The Ouachita*, ib. 521; *Griswold v. Waddington*, 16 Johns. R. 438.

² 100 Mass. 561.

his resources, and every kind of trading or commercial dealing or intercourse, direct or indirect. The action of Congress of July 13, 1861,¹ and the proclamation of the President pursuant to that statute, only prohibited commercial intercourse between the citizens of the States declared to be in insurrection and the citizens of the rest of the States. For all the purposes of this action it may be assumed that the rule, thus restricted, would prohibit the making of a contract during a state of war, for the insurance of the life of an enemy.

"This was rather assumed by the counsel for both parties upon the argument. It would certainly forbid the transmission of money for a premium from one of the States at war to the other, and it is said that the life of an alien enemy cannot be insured by his creditor, although the latter be a subject of the same country with the insurer.² The authorities cited to sustain this proposition were all, however, cases of insurance upon merchandise.³ The insurance upon the life of the husband of the plaintiff was a valid and lawful contract at the time it was made in 1849, and was for the term of his natural life, in consideration of a sum paid at the date of the policy, and further consideration of the annual payment of a like sum on or before the second day of April in every year. This was not a policy from year to year, but an insurance for life, subject to be defeated by the non-performance of the condition prescribed, to wit, the payment of the annual premium.

"It is expressly declared in the contract of insurance that if the annual payments should not be made, 'that said policy should cease and determine,' and 'that all previous payments made thereon should be forfeited to the company.' It was a life policy.⁴ The contract was not as to all its stipulations, and as to both parties, executory. It was executed by the plaintiff by the payment of the annual premiums from 1849 to and including 1861, while it was wholly executory on the part of

¹ 12 U. S. Statutes at Large, 257.

² Bunyon's Life Assurance, 19.

³ Harman v. Kingston, 3 Camp. 150; Potts v. Bell, 3 T. R. 548; Flindt v. Waters, 15 East, 266.

⁴ Hodsdon v. Guardian Life Ins. Co., 97 Mass. 144; Reese v. Mut. Ben. Life Ins. Co., 26 Barb. 556; New York Life Ins. Co. v. Clopton, 7 Bush (Ky.), R. 179.

the defendant, its undertaking being to pay the amount specified upon the death of the insured. It is no answer to say that the plaintiff had only paid for the risk incurred from year to year. The annual premium paid during the first years of a life policy is in excess of the actual risk, and this excess is so much paid in advance for the greater risk during the later years in case of a prolonged life. The insurers would be greatly the gainers by avoiding all life policies on young lives after the payment of the annual premiums for ten or fifteen years, terminating the risk before the greater hazard of loss — the result of advanced age — has been incurred. The contract was a continuing one in the sense that it was to be performed in the future, but it was not a contract of continuance in its performance. The act to be performed by the defendant was a single act, the payment of a specified sum upon the happening of a certain event, and in this respect was like a covenant or promise to pay a sum of money at a day certain, or upon any condition lawful in itself. There is no pretence that a contract of the latter kind would be dissolved by war. The contract would remain, the remedy would be suspended. The act to be performed by the plaintiff was a single act to be performed at stated periods, and was not like the contract of partnership, and some other contracts which are continuous in their performance.

“In the case of a marine insurance, or a contract of affreightment, a war might act as a dissolution, and put an end to them. The first is upon enemies’ property, and an insurance is in support of their commerce, and entirely inconsistent with the allegiance due to the government of the underwriter. As to such a contract, the authorities say the insurance terminates absolutely and at once by the very act of war, and the parties are in the same condition as if no contract was made; the one loses the premium, and the other his security against loss. But the rule will hardly apply to a life policy when large sums have been paid for premiums.

“There is nothing in the policy of the law, or the interest of the public, calling for an enforcement of the law of confiscation incident to a state of war, after the war has, and the

people of the two belligerent nations have, again become one, solely for the benefit of one of two contracting parties, by the forfeiture of the rights of the other. This would be simply a confiscation of property after war had ceased, at the instance and for the benefit of individuals.

“By the payment of the annual premium in April, 1861, the life was insured until April, 1862; the engagement of the defendant was then lawful, and was to the effect that the company would pay the plaintiff five thousand dollars upon the death of her husband within the year. A promissory note in that form, made upon a good consideration, would be obligatory, and if the death occurs within the year, although after war had intervened, the right of action would be suspended during the war, but revived with the return of peace.

“There is no reason apparent why the promise to pay money upon the termination of a specified life should necessarily be terminated by the happening of war between the States of which the parties are respectively subjects, as unlawful and inconsistent with the state of war, merely because it is called an insurance upon life. The policy in this instance protects the insurers and makes void the policy if the insured enter any military or naval service, or dies in the known violation of the laws of the United States, so that the risk was not increased by the state of war, nor the ability of the enemy to fill up the ranks of the army and navy affected by the insurance upon the life of its citizens.

“Those insured would rather be deterred from taking up arms against the United States, lest their policies should be avoided.

“Had the insured died at any time before April, 1862, I think there can be no doubt that the contract would have been regarded as one of those which, lawful when made and executed by the one party, are not dissolved, but merely suspended by the existence of war, and that a recovery could have been had at the close of the war.

“The contracts between individuals of belligerent States are necessarily suspended during the war of the States, but are not annulled.¹ Mr. Wheaton says commercial partner-

¹ Phill. Int. Law, 666; per Nelson, J., Prize Cases, *supra*.

ships are dissolved by the mere force and act of war, though as to other contracts it only suspends the remedy.¹ This is upon the principle that the States, and not the individual, wage war. The question then remains whether the non-payment of the annual premiums during the years 1862, 1863, and 1864 involved a forfeiture of the policy and of all payments before then made. That such would be the effect of the non-performance of the condition, unless waived or legally excused, is not disputed, and unless the performance was waived by the defendant, or is legally excused by the existence of the war, the plaintiff must fail in her action and submit to the loss resulting from the forfeiture. It must be borne in mind that the war was the act of the States, and that individual citizens are not identified with their government so as to expose them to the rule of law, that he who by his own conduct prevents the fulfilment of a contract, or renders its performance impossible, shall not take advantage of a non-performance on the other side, or excuse the non-performance on his part.² The condition of affairs which made the payment of the premiums by the plaintiff during the years named unlawful, and therefore impossible, was not created by the act or default of the plaintiff, but resulted from the acts of the governments of which the respective parties were subjects. There is a manifest distinction between mere impediments and difficulties in the way of the performance of a condition, and an impossibility created by law or the act of the government. This is clearly recognized in *Woods v. Edwards*³ and *People v. Bartlett*.⁴ An individual by his covenant may undertake, as against his own acts and the acts of strangers, but not against the acts of God or of his government, or of the obligee.⁵ In *Wolfe v. Homer*,⁶ the performance of the undertaking became impossible by the act of God in the death of the party, and performance was held excused upon the ground that the

¹ Wheat. Int. Law (8th ed.), 403, § 317.

² *Odlin v. Ins. Co. of Pennsylvania*, 2 Wash. C. C. R. 312; *Francis v. The Ocean Ins. Co.*, 6 Cow. 404; s. c. in error, 2 W. R. 64.

³ 19 I. R. 205.

⁴ 3 Hill, 570.

⁵ See per Nelson, C. J., *People v. Bartlett*, *supra*.

⁶ 20 N. Y. 197.

parties must be deemed to have made this an exception by implication. So, too, a party is excused from the performance of his covenant when the performance is made unlawful by act of Parliament. If made absolutely unlawful, it operates to repeal the covenant; if only temporarily unlawful, it suspends the operation.¹ Lord Alvanley, C. J., in *Touteng v. Hubbard*,² says: 'But when the policy of the State intervenes and prevents the performance of the contract, the party will be excused.' That which will avoid a covenant will nullify a condition, and *vice versa*.³ The policy of the law is to mitigate the severity of wars, and relieve citizens, so far as consistent with the interest of the government, from the hardships incident to it, and, *a fortiori*, the stringent and severe rule invoked by the defendant, should not be applied in a doubtful case so as to produce extreme hardship, when, by adopting a milder and more equitable rule, each of the contracting parties will secure equal and exact justice, and all their legal and equitable rights. The operation of the statute of limitations is held to be suspended during the war by reason of the inability to enforce the claim, and this is in harmony with the benign tendency of the age, the result of advanced civilization.⁴ Judge Clifford says, 'Neither laches nor fraud can be imputed in such a case.' At the time of making the contract in this case, the plaintiff had the legal right and ability to make the annual payments, but the effect of the war was to make the attempt unlawful, without any fault on her part. The operation of a condition as express and absolute as in this case, was held suspended during the war in *Semmes v. Hartford Insurance Company*.⁵ The condition there, as here, was by the act and agreement of the party, and yet, its performance being impossible, it was held to be inoperative, and the time for bringing the action extended, notwithstanding the agreement of the parties, by the mere act and effect of the war. It was held that the disability to sue imposed on the plaintiff

¹ *Brewster v. Kitchin*, 1 Ld. Raym. 317.

² 3 B. & P. 291.

³ *Platt on Cov.* 569; *Dougherty v. Neal*, 1 Saund. R. 214, n. (2).

⁴ *Hanger v. Abbott*, 6 Wall. 532.

⁵ 13 Wall. 158.

by the war relieved him from the consequences of failing to make the annual payments by the day. She was guilty of no laches, and why subject her to a forfeiture? No injustice is done the defendant in this case by permitting the plaintiff to make now the payments which she could not lawfully make between 1861 and 1865.

"The interest will compensate for the non-payment at the time, and the defendant in legal contemplation will be precisely in the situation it would have been had the money been paid on the law-day.¹

"The reasonings of the prevailing opinions in these cases abundantly sustain the judgments. The case comes before us on demurrer to the complaint, and if there are any equities, or any facts or circumstances which would deprive the plaintiff of the rights to which the case made by the complaint entitled her, the defendant may set them up by answer.

"It was also claimed that the defendant, being a mutual company, of which all holders of policies were members, it was a partnership which was dissolved by the war. Trading and commercial partnerships, and perhaps all partnerships, are dissolved by war between the States of the several partners. But whatever analogies there may be between mutual companies and ordinary partnerships, and the relation of the members of the two organizations, an incorporated company, although organized upon the mutual principle, is in no proper or legal sense a partnership. The defendant is a body politic and corporate, capable of contracting, and of suing and being sued, and the relation between the plaintiff and the corporation is that of insured and insurer, and the rights and duties of the contracting parties are to be governed and determined by the terms of the policy by which the insurance is effected, as in other cases. Other and incidental rights are secured to the plaintiff, as a member of the company and one of the corporators, but this does not make the members partners as

¹ *Manhattan Life Ins. Co. v. Warwick*, 20 Grattan, 614; and *New York Life Ins. Co. v. Clopton*, 7 Bush (Ky.), R. 179; *Hamilton Ex'r v. The Mut. Life Ins. Co. of New York*, recently decided in the Circuit Court of the United States, in the Southern District of New York, are precisely in point, and, if followed, decisive of this case.

between themselves, or affect the express contract of the corporation. If it was a partnership, as claimed, and dissolved by the war, the plaintiff has not forfeited her share in the assets of the copartnership, but is entitled to an accounting as of the day of the dissolution, and to her due proportion of the property and assets. This would lead to a result not desired by the defendant."

§ 351. And as the right, under such circumstance, to keep alive the policy by the payment of overdue premiums remains in the insured, so the insurers may demand and compel payment of the same.¹

§ 352. **Payment of Premium — Excuse — Intervening Death.** —

The payment of the premium on or before the day specified in a policy from year to year is a condition precedent, and its non-payment from year to year as it becomes due works a forfeiture of the policy; and the fact that the insured is stricken with paralysis on his way to the office to pay his annual premium does not excuse the non-payment or save the policy. This was not the intervention of an act of God in such sense as to be the foundation of an excuse. The payment of the premium is an act which can be performed by others than the insured, and does not depend upon the continued capacity of the insured. In point of fact, a man may be mentally and morally, and even physically incapable for years of existence, yet the premiums may be paid by his friends or relatives, or those interested in his case. And so they often are. The act required is not necessarily a personal act, but may be performed as well by others; and the failure therefore of the insured to perform it personally does not show that the act could not have been performed.² The insurers are not liable unless the death occur within the time covered by the policy.³

§ 353. **Days of Grace — Payment of Premium after Death of the Insured.** — And upon the point suggested by Hunt, J.,⁴ that such a payment can only inure to keep the policy alive when the

¹ Lynchburgh Hose Fire Ins. Co. v. Knox, Sup. Ct. City of Baltimore, *ante*, § 41.

² Howell v. Knickerbocker Life Ins. Co., 44 N. Y. (Com. of App.) 277.

³ Lockyer v. Offley, 1 T. R. 260.

⁴ *Ante*, § 346.

subject of insurance is alive at the time of payment, the case of *Pritchard v. Merchants' and Tradesmen's Mutual Life Assurance Society*¹ has an important bearing. In that case there was a condition that the policy should be void "if the premiums were not paid within thirty days after they should become due, but that the policy might be revived within three calendar months, on satisfactory proof of the health of the party on whose life the insurance was made." The insured died before the expiration of the thirty days, and the premium was forwarded and received the day after the expiration of the thirty days, both parties being ignorant of the fact of the death. Said Gray, for the insured, *arguendo*: "The receipt of the premium after the expiration of the thirty days does not operate the creation of a new policy, but is a mere waiver of a forfeiture, and an adoption of the payment as if made in due time. The distinction, therefore, of 'lost or not lost,' has no bearing on this case." [Willes, J.: "You say that the payment on November 15 had retrospective effect. Is not that contradictory to the terms of the receipt, which is stated to be for a 'renewal' of the policy, pointing to the future?"] "It is the ordinary form of receipt in use; the same that would have been given if the payment had taken place within the thirty days, and in the lifetime of the party." [Crowder, J.: "Would an original policy have been good, the party being dead at the time the assurance was effected? Would not that be within the case of *Coutourier v. Hastie*?² Was not this a receipt of money in ignorance of facts, which, if known, would have prevented the parties from accepting the payment?"] "This is not like the case of an action to recover back money which has been paid under a mistake of fact. If a man enters into a contract under a mistake, that mistake will not absolve him from the performance of his contract. Here the payment was to cover the risk from October 13, 1855, to October 13, 1856." [Crowder, J.: "But the man was dead when the transaction took place."] The counsel for the plaintiff was stopped by the court. Williams, J., in giving his opinion, said: —

"Taking the policy without the conditions, it is clear that

¹ 3 C. B. N. s. 622.

² 5 House of Lords Cases, 673.

the plaintiff would have no claim whatever against the company thereon after the 13th of October, 1854, unless he duly paid the premium for each ensuing year on or before that day. Then comes a condition (the second) which provides that the policy shall become void if the (yearly) premiums be not paid within thirty days after they become due respectively. Stopping there, it might be a question, and it is one which persons insured would be wise not to raise, whether this does not contemplate a payment by the assured himself, or whether, as has been contended on the part of the plaintiff, the effect of this condition is to absolutely extend the period for the payment of the premium, so that, if the assured should die within the thirty days, the company are still bound to accept the money ; such payment to all intents and purposes inuring as a payment within the time limited by the policy, so as to entitle the representatives of the assured to recover upon the policy, even though the assured should be dead at the time the premium was paid. The inclination of my opinion, if it be necessary to express one, and perhaps it is, for it has an important bearing on the case, is, that the thirty days are given only with reference to insurance for future years, and that, notwithstanding the life has become less valuable, the company are bound to go on insuring future years, provided the future premiums are paid within thirty days after the expiration of each period of insurance. However that may be, the payment here was not made within the thirty days. But then comes this further condition : ‘ But this policy may be revived within three calendar months, *on satisfactory proof of the health of the party on whose life the assurance is made*, and the payment of a fine of 2s. 6d. per cent upon the sum assured,’ &c. I am at a loss to see how that provision aids the plaintiff’s case. It assumes that the subject upon which the insurance is to attach is a living person, otherwise the stipulation for satisfactory proof of health would be idle and absurd. The very foundation of a life policy is, that it is a contract for the payment of a certain sum on the future death of a person in being, in consideration of the present payment of a premium. The renewals, like the original policy, clearly are only for the future assurance of a

living person. Then it is said, that, by accepting the premium after the expiration of the thirty days, the directors must be taken to have waived the giving of proof of the health of the party on whose life the assurance was made, and that the payment inured as a payment made in due time, and that the policy was thereby revived. Taking that literally, it is, that the directors waived the production of proof of the state of health of a man who was supposed to be alive, not the *fact* of his being alive. They cannot be assumed to have waived the condition that the person whose life was insured should really be a living person at the time the renewal or revival of the policy took place. Then it is said that the payment and acceptance of the premium created a new contract. But in truth it is no new contract at all ; it was intended as a payment under the original contract. The result is, that the policy was not renewed, and our judgment must be for the defendants."

Byles, J. : "I also think that the defendants are entitled to judgment. An important question is glanced at here, namely, as to the effect of a payment of the premium on a life policy after the expiration of the period covered by the policy, and within the number of days usually allowed by the conditions for making the payment, or, as they have been called, the days of grace. I am not aware of any authority upon that subject, except what fell from the court in the recent case of *Simpson v. The Accidental Death Company*.¹ It is unnecessary on the present occasion to pronounce any opinion upon that question. It may be observed that, whatever might have been the construction of the policy if it had been utterly silent in this respect, here it is in terms a contract or undertaking against the happening of a future event. 'Dead or alive' — which would be equivalent to 'lost or not lost,' in a marine policy — seems to be excluded by the terms of the policy and the third condition. But the objection that the payment did not take place within the thirty days, clearly appears to me to be fatal to the plaintiff's claim. The payment and receipt were *ultra* the condition and under a mistake. The effect would be that the plaintiff might maintain an action to recover back the premium so

¹ 2 C. B. N. s. 257.

paid, on the ground of its having been paid and received under a mistake of facts."

§ 354. *Days of Grace — Payment of Premium after Death.* — The case of *Simpson v. Accidental Death Insurance Company*, referred to in the last section, was this. The insured took out a policy against death by accident, the premium upon which was payable on the twenty-second day of January, annually. One of the conditions provided that the premium should be paid "within twenty-one days from the day on which the same should accrue or become due," and that, "provided the same should be from time to time paid within such space of twenty-one days, the policy should not be void, notwithstanding the happening before the expiration of such space of twenty-one days of the event, upon the happening whereof the amount secured by the policy should, according to the terms hereof, become payable." Another condition provided that "if the premium should be unpaid for twenty-one days next after it should become due, the policy should be absolutely void." And it was also provided in another condition that "in every case where a new premium should become payable, the directors should be at liberty to terminate the risk by refusing to accept the premium." The insured was killed by accident on the 1st of February, the premium due on the 22d of January preceding not having been paid nor tendered, nor was it afterwards until after the expiration of the twenty-one days. Upon these facts it was held that the premium was to be paid by the insured and not by his executor, and that if the latter had tendered it within the twenty-one days, it would, if not accepted, have been of no avail; that the non-payment within the time limited rendered the policy void; and that under the terms of the last condition neither the executor nor the assured, had he been living, would have had an absolute right to keep the policy alive by the payment or tender of the premium within the twenty-one days, as the insurers had received the option to continue or to refuse to continue at their discretion.

§ 355. *Days of Grace — Payment of Premium after Death — Prospectus.* — And to the same effect is *Mutual Benefit Life Insurance Company v. Ruse*,¹ where the policy was to be void

¹ 8 Ga. 534.

if the annual premiums were not paid on or before a specified day of each year. But the company issued a prospectus, not referred to in the policy, stating among other things that any one neglecting to pay his premium for thirty days after the same became due, forfeited his insurance. The premium was not paid on the day specified, but was tendered before the expiration of thirty days, though not till after the death of the insured, and refused. And the question was whether the prospectus was admissible in evidence to control the provisions of the policy and to extend the time of payment of the premium for thirty days. And the court held the prospectus inadmissible, and also if it were admissible, that it could not have the effect of reviving a policy where the insured had died before the payment of the premium within the thirty days. "If," said the court, "a tender of the premium had been made in this case after the day of payment named in the policy, and before the expiration of thirty days, *the insured being in life*, I should incline to the opinion that they would have been bound by it; but if made within the thirty days, the insured being dead, and the fact of his death known to the parties, there would be in that event no contract, no consideration for the insurance, no mutuality. It would be an act of mere futility, out of which no liability could spring. . . . There can be no valid contract for the insurance of the life of a dead man." And upon the same facts the Court of Appeals of New York¹ came to the same conclusion, reversing the decision in the same case in the court below.²

§ 356. **Non-payment of Premium — Excuse — Prospectus.** — Afterwards, however, upon a motion for a rehearing, and upon the citation of three English cases,³ the court observed that the

¹ *Ruse v. Mut. Ben. Life Ins. Co.*, 23 N. Y. 516.

² 26 Barb. (N. Y.) 556. There seems to be some confusion about the facts. In the report of the case in the Supreme Court, it is stated by the judge who gave the opinion that the tender of the premium was before the death, — a fact which if true would doubtless justify that decision. But the opinion in the Court of Appeals, as well as the same case in Georgia, show that the tender was not till after the death of the insured. In neither case, however, do the court seem to lay much stress on the fact of the time of payment.

³ *Wood v. Dwaris*, 11 Exch. 493; *Wheulton v. Hardisty*, 92 E. C. L. 231; *Collett v. Morrison*, 9 Hare, 173.

cases referred to did certainly hold that the prospectus might equitably be regarded as forming a part of and controlling the terms of the contract, and that it was not improbable that an examination of these cases would have led to a different conclusion than the one arrived at upon that point ; but as the judgment was right upon another ground, it would not disturb it.¹ The first two of the English cases referred to held that a prospectus issued by the company, contemporaneously with the policy, stating that these policies are indisputable except upon the ground of fraud, estop the companies from setting up the defence of a misrepresentation, unless it be alleged that it was fraudulent as well as false. The last case² merely holds that equity will reform a policy not made out according to the agreement of the parties. But a still later English case than any of the three before cited³ holds that a party interested may avail himself of the statements contained in such a prospectus to relieve himself from the obligations of a contract which he has entered into, and to which the prospectus refers. In *Salvin v. James*,⁴ it seems to have been taken for granted that such a prospectus was to be deemed a part of the contract. In the opinion of Lord Campbell,⁵ a statement in the prospectus of a company that all policies will be indisputable except for fraud, waives all forfeitures except for personal fraud on the part of the insured. The fraud of third parties does not avoid such a policy, and it is as if the statement were broadly that all policies were indisputable ; since the law would interpose to protect the insurers against the personal fraud of the insured.

§ 357. **Payment of Premium — Days of Grace — Cy pres Performance.** — In an early case, when policies of insurance were usually under seal, an attempt was made to introduce the doctrine of *cy pres* into the interpretation of these contracts, in analogy to the rule as to the interpretation of conditions respecting real estate, claiming that such conditions need not be strictly performed according to the letter, but it is enough if they be performed as near as may be and according to the

¹ 24 N. Y. 633.

² *Collett v. Morrison*, the earliest in date.

³ *Central Railway Co. v. Kisch*, 2 H. L. Cas. 99.

⁴ 6 East, 571.

⁵ *Wheelton v. Hardisty*, 8 E. & B. 282.

intent. The case was one where a party for the benefit of his wife, in consideration of quarterly payments to be made by him during his life, stipulated for the payment of an annuity to his wife from and after his decease during her life. The insurers covenanted to pay such annuity on condition that the assured should pay, in addition to the quarterly premium, the proportion of contributions which the members of the society should, during his life, be called on to make; and by the rules of the society, if any member should neglect to pay the quarterly premiums for fifteen days after they respectively become due, the policy should be void, *unless the member, continuing in as good health as when the policy expired*, should pay up the arrears within six months. The member died, leaving a quarterly payment due and unpaid at the time of his death, and his executor tendered the amount due within fifteen days after it became due. But the court, after referring to the authorities in favor of such a construction of conditions annexed to real estate, and to the argument for the plaintiff that the payment of the premium in these cases was analogous to a condition to create an estate, declared that the analogy did not hold good, and that the rules applicable to conditions with respect to real estate did not apply, and that this being a contract of insurance must be construed according to the intent of the parties expressed in the deed or policy. The executor's tender of the amount due within fifteen days after it became due, the insured not being then a member continuing in as good health as when the policy expired, did not revive the policy.¹ And in *Tarleton v. Stainforth*,² in a case of fire insurance where the premium was tendered within the fifteen days' grace allowed, but not till after the loss, it was upon the same principle held that the tender would not revive the policy. In this case the insurance was from half-year to half-year, "as long as the insurers should agree to accept the same" within fifteen days after the expiration of the former half-year; but there was to be no insurance till the premium was actually paid.³ In *McDonnell v. Carr*,⁴

¹ *Want v. Blunt*, 12 East, 183.

² 5 T. R. 695; affirmed in the Exch. 1 B. & P. 470.

³ See also *Salvin v. James*, 6 East, 571.

⁴ *Hayes & Jones (Irish)*, 256.

however, where the policy was renewable from year to year, at the discretion of the insurers, but provided that "no policy will be considered valid for more than fifteen days after the expiration of the period limited therein," unless the premium be paid, it was held that the insurers were liable for a loss before payment of the premium within fifteen days, as the contract was in effect an insurance for a year and fifteen days.

§ 358. **Non-payment of Premium — Excuse — Insolvency of Insurers.** — The non-payment of a premium falling due after an order issued, upon the petition of the insurers, to wind up the affairs of the insurance company, does not work a forfeiture of the rights of the insured against the company. This is practically a determination of the contract by them, and not by the policy holder. He therefore need take no further steps to keep his policy alive, but may prove his claim for damages, as of the day when the order to wind up took effect.¹ And the measure of damages in such case is the same which an insurance company charging the same rate of premium will require to continue the policy.²

§ 359. **Premium — Payment — Evidence.** — The recital in the policy of the receipt of the premium is *prima facie* evidence of the payment, but only *prima facie*. Like all other receipts, it is open to explanation.³ In *Norton v. Phoenix Life Insurance Company*,⁴ it appeared that the local agent of a life insurance company took out a policy on his own life for the benefit of his wife. He was supplied by his principal with renewal receipts, all of which by their terms were to be valid only upon their being countersigned by the agent. He took a receipt for the premium paid by him one year, but did not countersign it. It was not disputed that the premium was paid for that year.

¹ Re Albert Life Ins. Co., 22 Law Times, N. S. (James, V. C.) 92; s. c. Law Rep. 9 Eq. 703.

² Ibid.; Law Times, N. S. 697; Law Rep. 9 Eq. 706.

³ Pitt v. Berkshire Life Ins. Co., 100 Mass. 500; Sheldon v. Atlantic Fire and Mar. Ins. Co., 26 N. Y. 117; Baker v. Union Life Ins. Co., 43 N. Y. 283, overruling s. c. 6 Abb. Pr. (N. S.) 144; New England Mut. Life Ins. Co. v. Hasbrook, 32 Ind. 447. *Contra*, in Illinois, Provident Life Ins. Co. v. Fennell, 40 Ill. 398; and in Louisiana, unless the insurers can show fraud or duress. Michael v. Nashville Ins. Co., 10 La. An. 737.

⁴ 36 Conn. 503.

But for the next year only a renewal receipt, not countersigned by him, was found among his papers after death, and payment of the loss was resisted on the ground that the premium for the last year was not paid. But an equally divided court held that there was no error in the instruction to the jury that the last-named receipt was *prima facie* evidence of the payment of the premium. And in *Myers v. Keystone Mutual Life Insurance Company*,¹ the court were inclined to the same opinion. But in Massachusetts, in a case² where the policy provided that it should not be in force till countersigned by the agent, and as, in the Connecticut cases, the policy was upon the life of such agent, and was found after his death amongst his papers, but not countersigned, the court held that the policy never was in force.

§ 360. **Payment of Premium — Waiver.** — But the prepayment of a premium may be waived, as by an assurance that the payment of the money on delivery of the policy “makes no difference.”³ And if the agent be authorized to receive the premium, an agreement between the applicant and the agent that the latter will be responsible to the company for the amount, and hold the applicant as his personal debtor therefor, is a waiver of the stipulation in the policy that it shall not be binding till the premium is received by the company or its accredited agent.⁴ The same is true if the language of the policy is that the premium shall be paid before the policy shall become valid.⁵ And if the policy requires actual payment, and the assured offers to draw his check for the amount of the premium upon the bank where the agent also keeps his account, the cashier telling him at the time the arrangement for insurance was made that he could have the money, but the agent said, “Let the money lie and I will draw for it when I want it,” and did actually draw it, but not till after the loss, this is also a waiver of prepayment.⁶

¹ 27 Penn. St. 268.

² *Badger v. American Pop. Life Ins. Co.*, 103 Mass. 244.

³ *Bragdon v. Appleton Mut. Ins. Co.*, 42 Me. 259; *Bodine v. Exch. Fire Ins. Co.*, N. Y. Com. of App., 2 Ins. L. J. 23.

⁴ *Sheldon v. Conn. Mut. Life Ins. Co.*, 25 Conn. 207.

⁵ *Bouton v. American Mut. Life Ins. Co.*, 25 Conn. 542.

⁶ *New York Central Ins. Co. v. Nat. Prot. Ins. Co.*, 20 Barb. (N. Y.) 469; *Hallock v. Com. Ins. Co.*, 2 Dutch. (N. J.) 268.

And in fact the delivery of the policy, without exacting the payment, raises the presumption that a credit is intended, and is a waiver of the condition of prepayment.¹ And the waiver may be inferred from a variety of circumstances; in fact, from any circumstances from which the jury may fairly infer that the insurers did not intend to insist upon the prepayment of the premium as a condition precedent.² And so of the non-payment of an annual premium due on a specified day.

§ 361. **Practice of Company to accept Premium within thirty Days after due.** — Forfeitures are so odious in law that they will be enforced only where there is the clearest evidence that such was the intention of the parties. If the practice of the company and its course of dealings with the insured, and others known to the insured, have been such as to induce a belief that so much of the contract as provides for a forfeiture in a certain event will not be insisted on, the company will not be allowed to set up such forfeiture, as against one in whom their conduct has induced such belief. Accordingly, a custom amongst insurance companies to receive premiums, if tendered at any time within thirty days of the time they fall due, provided the insured is in usual health, and that this is the custom among companies issuing policies stipulating that non-payment of premiums at the day specified shall work a forfeiture, has been held to be admissible against a company having a similar provision for forfeiture, which is shown to have repeatedly received, within thirty days after due, of the assured, against whom it insists upon the forfeiture, premiums, which by the terms of the policy were payable on a certain day on penalty of forfeiture.³ And a part payment accepted is a waiver of a forfeiture for non-payment at maturity.⁴ But a mere demand,

¹ *Wood v. Poughkeepsie Ins. Co.*, 32 N. Y. 619; *Bouton v. American Mut. Life Ins. Co.*, 25 Conn. 542; *Boehen v. Williamsburg Ins. Co.*, 35 N. Y. 131; *Miller v. Brooklyn Life Ins. Co.*, 12 Wall. (U. S.) 288; *Sheldon v. Atlantic Fire and Mar. Ins. Co.*, 26 N. Y. 460.

² *Heaton v. Manhattan Fire Ins. Co.*, 7 R. I. 502; *Goit v. Nat. Prot. Ins. Co.*, 25 Barb. (N. Y.) 189.

³ *Helme v. Philadelphia Life Ins. Co.*, 61 Penn. St. 107; *Thompson v. St. Louis Ins. Co.*, Sup. Ct. Mo., 2 Ins. L. J. 422; *Buckbee v. U. S. Ins. & Tr. Co.*, 18 Barb. 541.

⁴ *Hodsdon v. Guardian Life Ins. Co.*, 97 Mass. 144.

or even suit brought, for the premium, not yielded to, is no waiver.¹

§ 362. **Premium — Acceptance of part Payment — Waiver.** — And generally the acceptance of a premium after full knowledge of the violation of the condition of a policy, respecting the payment of the premium, or otherwise, is a waiver of any forfeiture thereby. Thus, where a policy inhibits the insured from passing without the limits of the United States, but has indorsed thereon a permit to go to California by a certain route, and the insured goes by a different route, and the insurers, after the arrival of the insured in California, and with full knowledge of the fact of deviation, accept one or more annual premiums (whether there is or is not a forfeiture by reason of the deviation is a question which was not decided), it is not open to the insurers to take the objection, for the acceptance of a subsequently accruing premium with knowledge is a waiver of the forfeiture, if any there be. And parol evidence is admissible to show such knowledge, and thus establish the waiver.² And such acceptance has been held to be a waiver of forfeiture by reason of concealment in the application.³

§ 363. **Premium — Part Payment and Acceptance — Waiver.** — In *Thompson v. St. Louis Mutual Life Insurance Company*,⁴ an attempt seems to have been made to avoid the effect which courts are inclined to give to the acceptance of postpaid premiums, by a statement at the foot of the policy that "if a premium is received by the company after the day named in the policy for its payment, it is considered by the company and by the assured as an act of grace or courtesy, and forms no precedent as regards future payments." But the court held, nevertheless, a known practice of receiving payments of premiums after they were due to be a practical construction of the force and effect of the provision for prompt payment, and a waiver of a forfeiture by reason of a failure strictly to conform thereto. "In contracts of insurance, as in other con-

¹ *Edge v. Duke*, 18 L. J. Ch. 183.

² *Bevin v. Conn. Mut. Life Ins. Co.*, 23 Conn. 244; *Wing v. Harvey*, 5 De G., M. & G. 265.

³ *Armstrong v. Turquand*, 9 Ir. C. L. 32.

⁴ *Sup. Ct. of Mo.*, 2 Ins. L. J. 422.

tracts," said the court, by Adams, J., "the parties may make the time of the performance of any stipulation of the very essence of the contract. In such case the contract becomes utterly at an end or void as soon as the default is made. The stipulation in regard to the time of the payment of the premiums in this policy I do not regard as of the essence of the contract. It was not so regarded by the parties themselves. By their acts and conduct the parties have construed this contract for themselves. It was not regarded by either party as of the essence of the policy that the premiums would be paid on the very day that they became due. The memorandum at the foot of the policy did not give any additional force to the stipulation in the policy, if we may consider it as having any effect whatever. If it had any force, it seemed to be looked upon by the parties as a license or invitation to the plaintiff to disregard the exact day of payment, and to rely upon the courtesy of the company. The plaintiff pursued this course, and, instead of making his payments on the very day when due, let them lie over for a short time, and still they were received without objection. The plaintiff was thus induced to believe that a failure of strict payment on the day would not prejudice his rights."

CHAPTER XVI.

OF THE SPECIAL PROVISIONS OF THE CONTRACT (*continued*).

§ 364. **Other Insurance.** — It is important for the insurers to know the amount of insurance upon the particular subject-matter, in order that they may duly estimate the risk, since the greater the amount of the insurance the greater the temptation to destroy the property or life or other subject-matter, or in some other way to bring about the event upon which the loss is made payable. And it is obvious that the interest to know the fact of other insurance is the same, whether it exist at the time of entering into the new contract, or be procured afterwards. Such insurance is sometimes called over insurance or double insurance. It is also of importance to the insurer to know of other insurance, that he may determine his proportionate liability in case of being called upon to contribute towards the indemnity for a loss. Insurers may be presumed to rely more upon the interest than upon the character of the insured for protection against the carelessness and fraud of the owners, and therefore take care that the property be so far uncovered by insurance that it is for the interest of the owner that it should not be destroyed. To enable them to do this, it is necessary that they should be informed whether the property on which insurance is applied for is elsewhere insured, and to what extent; and that this interest of the insured may not afterwards be decreased by his procurement of further insurance, the stipulation that the policy shall be void if other insurance exist at the time and be not disclosed, or subsequent insurance be obtained and be not notified to the company, is resorted to.¹ The general doctrine that a previous or subsequent insurance without notice, under a policy requiring notice of such insurance, upon pain of forfeiture, discharges the insur-

¹ *Hutchinson v. West. Ins. Co.*, 21 Mo. 97.

ers from any obligation to pay for a loss happening under such circumstances, is well settled and universally recognized. That this should be the effect of the concealment or failure to give notice as the case may be, is not only a part of the contract, and obligatory upon that ground, but the forfeiture is just and reasonable. The insurer can never know the full extent of his risk unless he knows every thing that bears upon the risk. He has a right to take into account the fact that the insured has a greater or less unprotected interest, whereby his vigilance may be quickened in the preservation of the property. But in order to estimate this interest truly, he must know to what extent insurance is actually had. It may be that the insurance is to such an amount as to stimulate to neglect in the preservation, or even to the fraudulent destruction, of the property insured. This prudent insurers should endeavor to guard against; and deception or failure to notify when required on this point, operates as a fraud upon them. They have contracted for that protection, and have a right to its advantages; and the insured cannot be permitted to show that there was no fraud in fact, that the property was vigilantly guarded, that the insured could not have prevented the loss, or even that the insurer — as in case the loss is less than the amount insured by all the policies — is benefited by the over insurance, since he will only be required to pay, by way of contribution, his proportion of the loss instead of the whole amount stipulated. This is one of those provisions not regarded with the jealousy due to those ordinarily working forfeitures, but will be upheld without reluctance as a fair and just provision for a reasonable and proper purpose.¹

§ 365. **What amounts to other, over, or double Insurance.** — It is additional and valid insurance, prior or subsequent, upon the same subject, risk, and interest, effected by the same insured or for his benefit, and with his knowledge or consent. Owners of different interests in the same property may respectively insure their interest without risk of violating a provision against other insurance.² The additional insurance must be

¹ *Obermeyer v. Globe Mut. Ins. Co.*, 43 Mo. 573.

² *Ætna Ins. Co. v. Tyler*, 12 Wend. (N. Y.) 507; s. c. affirmed, 16 Wend.

valid. Subsequent insurance, void by its own terms, because it is additional and without notice of prior insurance, is no insurance within the meaning of the usual condition against other insurance.¹ So if a prior insurance is void, by reason of a violation of some other condition, its non-disclosure will not avoid a policy requiring notice of prior insurance.² This doctrine is, however, denied by some most respectable authorities.³ In Georgia, by the Code, a second insurance, without consent of the first insurers, avoids the policy. Under this statute it is held that a second insurance, though invalid, avoids the policy.⁴ A distinction has, however, been taken between a policy apparently securing over insurance which was void at the time of the loss, in which case recovery may be had, and a like policy which is voidable only by reason of some breach of condition which works a forfeiture, but which forfeiture has been waived, in which case the over insurance is at the time of the loss an existing fact, and a recovery cannot be had.⁵ In *Atlantic Insurance Company v. Goodall*,⁶ it was held that, where a policy was upon condition to be void if other insurance should not be indorsed on it, the existence of prior insurance did not make it absolutely void, but voidable only, and that it

387; *Sloat v. Royal Ins. Co.*, 49 Penn. St. 14; *Forbush v. West Mass. Ins. Co.*, 4 Gray (Mass.), 337; *Nichols v. Fayette Mut. Ins. Co.*, 1 Allen (Mass.), 63; *Harris v. Ohio Ins. Co.*, 5 Ohio, 467; *Franklin Ins. Co. v. Drake*, 2 B. Mon. (Ky.) 47; *Park v. Phoenix Ins. Co.*, 19 Upper Canada (Q. B.), 110; *Root v. Cincinnati Ins. Co.*, 1 Disney (Ohio), 138. But see *post*, § 366.

¹ *Stacey v. Franklin Ins. Co.*, 2 W. & S. (Penn.) 506; *Jackson v. Mass. Mut. Fire Ins. Co.*, 23 Pick. (Mass.) 418; *Gale v. Belknap County Ins. Co.*, 41 N. H. 170; *Schenck v. Mercer County Mut. Ins. Co.*, 4 Zab. (N. J.) 447; *Philbrook v. New England Mut. Ins. Co.*, 37 Me. 137; *Hardy v. Union Mut. Fire Ins. Co.*, 4 Allen (Mass.), 217; *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520.

² *Jackson v. Farmers' Mut. Ins. Co.*, 5 Gray (Mass.), 52; *Clark v. New England Mut. Ins. Co.*, 6 Cush. (Mass.) 342.

³ *Bigler v. New York Central Ins. Co.*, 22 N. Y. 402; *Campbell v. Aetna Ins. Co.*, Sup. Ct. Nova Scotia, 1860, cited in *Clarke's Digest of Fire Ins. Cases*; *Ramsay, &c. v. Mut. Fire Ins. Co.*, 11 Upper Canada, 516.

⁴ *Lackey v. Georgia Home Ins. Co.*, 42 Ga. 457.

⁵ *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Penn. 402; *Carpenter v. Prov. Ins. Co.*, 16 Pet. (U. S.) 495; *Jacobs v. Equitable Ins. Co.*, 19 Upper Canada, 250, 257.

⁶ 35 N. H. 328.

might be confirmed and made valid by acts of the company showing a waiver of the defect. And in *New England Fire Insurance Company v. Schettler*,¹ it was held that if the other insurance had ceased by its own limitation, before the loss claimed under a subsequent policy, the right of recovery on the last policy would not be affected. In *David v. Hartford Insurance Company*,² it was held that a policy securing subsequent insurance, upon its face valid, and the amount of which upon a loss happening had been paid, constituted additional insurance within the meaning of the condition, although it might have been avoided by extrinsic evidence of a forfeiture for condition broken. And in *Mitchell v. Lycoming Mutual Insurance Company*,³ the rule was stated thus: When policies, alleged to be for other insurance, are void at the time of the loss, they are no obstacle to a recovery on the policy on which the claim is made; but if voidable only for some breach of condition for which the insurers might have avoided them, but which nevertheless they have waived, double insurance exists. This subject was also much discussed in a very recent case in Iowa,⁴ where there were two policies upon the same property, each having a condition against both prior and subsequent insurance. The opinion of the majority of the court⁵ upon this point was given by Beck, J., who, after stating the conclusions of the court upon two preliminary questions, — first, that the policy of the Hartford company was prior in date, and second, that the receipt given by the agent of the Phoenix company amounted to a contract of insurance upon the usual terms and conditions as expressed in the policy which the agent was empowered to issue, — thus proceeds: —

“The policy, which is the foundation of this action, contains a condition in the following words: ‘If the assured shall

¹ 38 Ill. 166.

² 13 Iowa, 69.

³ 51 Penn. St. 408.

⁴ *Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325, very similar to *Gale v. Belknap Ins. Co.*, *ubi supra*.

⁵ Miller, J., dissented, on the ground that when the policy was taken from the Phoenix office, there was no insurance in the other, and therefore it became void when the policy was received from the Hartford office the next day, there being then for the first time double insurance.

have, or shall hereafter make, any other insurance upon the property hereby insured, without the consent of the company written hereon, in such case this policy shall be void.' As a defence the defendant alleges that, in violation of the condition, the insured, Howe, did cause the property to be insured by a policy issued by the Phoenix Insurance Company, Jan. 21, 1867. The policy sued on is dated Jan. 19, 1867.

"It appears from the evidence that Howe applied to the agent of the defendant on the eighteenth day of December, 1867, for insurance, and it was arranged that the policy should be issued and sent to him on that day. Howe not having received the policy from defendant's agent, nor heard from him in regard to the business, on the 21st of the same month applied to the agent of the Phoenix Insurance Company for a policy covering his property. The terms of the insurance were agreed upon, but the agent having no blank policies, executed a receipt to Howe for the amount of the premium then paid him, specifying the property to be insured, which was the same covered by the policy issued by defendant, and stipulating that a policy would be issued as soon as the blanks should be received. The agent of the Phoenix company was not informed by Howe of his application to defendant's agent for insurance, and it appears that Howe, at the time, did not expect to receive the policy of the defendant, as it had not been sent to him, according to the prior arrangement. On the 22d, the day subsequent to the transaction with the agent of the Phoenix company, the agent of the defendant delivered to Howe the policy sued on, dated on the 18th, and received payment of the premium. Howe did not inform him of his transaction with the Phoenix company. The property covered by these policies was destroyed by fire on the 26th. Under these facts defendant insists that the transaction with the Phoenix Insurance Company is in violation of the conditions of the policy against other insurance quoted above, and that defendant's contract is avoided thereby. The question here presented is of very great difficulty, and its solution, either upon principle or authority, is not entirely free from doubt. . . . We now have the case of two policies, given at different dates, covering the same prop-

erty, each having a condition against other insurance, both prior and subsequent, and providing that a breach thereof shall avoid the respective instruments. The question for us to determine is which, if either, of these instruments is valid, and which is avoided by the operation of a breach of the condition.

“ It will be remembered that a breach of the condition does not absolutely render void, and of no effect, the policy ; it simply renders it voidable, — its binding force and effect being subject to be defeated at the option of the company issuing the instruments. If no objection be made by the company on account of the breach of the condition, the policy may be enforced as though no forfeiture had ever happened. The act of the company, whereby it is shown that the instrument is treated as avoided, must be shown in order to defeat recovery thereon. If no such act or objection on the part of the company be shown, the contract will be considered binding. It is not necessary here to state what will amount to an act avoiding the contract, or when it must be done, further than to observe that it must appear that the underwriter relied upon the breach of the condition to defeat the contract.

“ Of course the company issuing the subsequent policy could not rely upon the breach of the condition, in order to avoid the instrument until knowledge thereof was acquired, and its acts treating the policy as avoided would be sufficient, if shown to have been done after such knowledge. The same principles will apply to the prior policy. It was not absolutely void on account of the subsequent insurance, but was voidable only. It was a binding instrument when executed, and would so continue until some act done by defendant intended to avoid it, on account of the breach of the condition against the subsequent insurance. But it could not be avoided on account of the Phoenix policy, unless that instrument itself was valid. If it so happened that when the action was brought on defendant's policy, or even at the trial, it was made to appear that the Phoenix policy could not be enforced, was avoided on account of a breach of the condition therein, it is obvious that the existence of that instrument, shown to be in operation,

would not constitute a breach of the condition in defendant's policy against subsequent insurance. That condition is against actual insurance to be subsequently made. The Phoenix policy created no insurance; it was avoided by the act of the company, and therefore did not constitute a breach of defendant's policy. The general principle of law may be stated as follows: In order to avoid a policy on account of a subsequent insurance against an express condition therein, it must appear that such subsequent insurance is valid, and that the policy upon which it is made is capable of being enforced. If it cannot be enforced, it is no breach of the prior policy. . . . The doctrine which we have assumed does not go to the full extent of some of the cases just cited.¹ It is held in *Philbrook v. New England Mutual Insurance Company* that the prior policy is valid, even though the subsequent policy is not avoided by the underwriter issuing it, but the loss thereon is paid. And in others of these cases the rule is not expressly based upon the fact that the subsequent policy was treated by the underwriter issuing it as avoided.

"The doctrine which we recognize here is based upon the fact that the subsequent policy was treated and considered as avoided by the company issuing it as soon as it had notice of the prior insurance. In our view this is a most important consideration; for, if the underwriter in the second policy does not treat it as avoided, it cannot be so considered by the insured, or the company issuing the prior policy. The condition against prior insurance in the subsequent policy is for the benefit of the insurer, who may, at his option, waive it or insist upon enforcing its terms. If he seeks to enforce the condition, and treats the policy as a void contract, it is indeed difficult to see upon what grounds it may be regarded as valid, as an insurance that will defeat the prior policy. In this view, our conclusion is not in conflict with *David v. Hartford Insurance Company* and *Bigler v. New York Central Insurance Company*. In the first of these cases an action was brought upon a policy containing a condition against subsequent insur-

¹ The cases of *Gale*, *Schenck*, *Stacey*, *Philbrook*, *Clark*, and of the two *Jacks*, cited *supra*.

ance. Other insurance, taken after the date of the policy, was relied on to defeat it. The plaintiff claimed that the subsequent policies, on account of certain conditions therein which were violated, were void. It was held that these policies are not void, but, on account of the breach of these conditions, might have been avoided. As they were treated as valid contracts by both of the parties thereto, the losses occurring thereon having been paid by the companies executing the subsequent policies, the breaches of the conditions were regarded as waived, and the instruments held to be binding upon the respective underwriters. The argument supporting the conclusion reached by the court may not entirely accord with the reasoning we have above adopted, but the result reached, we believe, is not inconsistent with the views herein expressed. *Bigler v. New York Central Insurance Company* in its facts very nearly resembles that case, the underwriter taking the subsequent risk having waived the forfeiture and paid the loss under the policy. There are arguments and positions taken in the opinions in this case which are not consistent with the views we have adopted. They reach further than the mere support of the conclusion arrived at upon the facts involved in the case, the Court of Appeals holding (two justices dissenting) that the first policy would be defeated even though the second was utterly void. This point was not in the case. While we may not be inclined to dispute the conclusion arrived at upon the facts presented, which we think not at all in conflict with our views, we cannot assent either to the reasoning adopted by the court, or the conclusions reached upon facts not before it for adjudication.

“*Carpenter v. Providence Washington Insurance Company*¹ is cited in support of the rule that where there are two insurance policies, both containing conditions of avoidance on account of other prior or subsequent insurance without notice, the first may be avoided on account of the second insurance. This case, we have observed, is often cited in support of this rule, and was so in the two cases just referred to. If such a rule be found in the case, — but it does not so appear to us, —

¹ 16 Pet. (U. S.) 495.

its annunciation was not called for by the facts before the court and made the basis of the decision. The policy upon which the suit was brought is considered in the opinion the second instrument, and the court holds that it was defective by a condition therein against prior insurance, which in fact existed when it was issued.¹ The conclusion arrived at, we think, is not in conflict with the course of argument adopted by us, and the result reached in this case. The argument, however, adopted by the court in reaching the conclusion is hardly consistent either with our reasoning or its results. But inasmuch as the facts are dissimilar to those before us, and the point ruled not necessarily in conflict with our decision, the case cannot be regarded as an authority against the principles we herein recognize."

And when a party who already has insurance takes by assignment a policy requiring notice of prior insurance, a failure to give notice of the prior insurance will avoid the policy.² If the policy provides that it shall be void if any other insurance be made, reference is had only to subsequent insurance;³ and if two policies are made out and delivered simultaneously by two companies, co-operating together, the clause in either policy requiring notice of prior or subsequent insurance can have no application.⁴

§ 366. *Identity of Interest.* — When it is said that the insurance, in order to come within the prohibition, must be the same, it is not meant that it is the same in all respects; *i.e.*, that the description of the subject-matter of insurance be the same in both. It is enough if the subsequent insurance covers a part of the interest embraced in the prior insurance, as when an undivided half of a house, already insured, is covered by the new insurance;⁵ or the subject-matter of the subsequent insurance embraces the property covered by the prior insur-

¹ 16 Pet. (U. S.) 500.

² *Leavitt v. Western Mar. and Fire Ins. Co.*, 7 Rob. (La.) 351; *Walton v. La. St. Mar. and Fire Ins. Co.*, 2 ib. 563.

³ *Mussey v. Atlas Mut. Ins. Co.*, 4 Ker. (N. Y.) 79.

⁴ *Washington Fire Ins. Co. v. Davidson et al.*, 30 Md. 91.

⁵ *Columbus Ins. Co. v. Walsh*, 18 Mo. 229; *Liscom v. Boston Mut. Fire Ins. Co.*, 9 Met. (Mass.) 205; *Mussey v. Atlas Mut. Ins. Co.*, 4 Ker. (N. Y.) 79.

ance, and other property besides.¹ But removing goods located in one store already insured into another store, also having its goods insured in another policy, though both lots of goods belong to the same person, is not a case of double insurance.²

The somewhat peculiar case of *Hough et al., appellants v. People's Insurance Company*³ was this: The Baltimore Warehouse Company, which received goods on storage, and issued receipts or certificates therefor to the depositors, effected an insurance in the Associated Firemen's Company for \$10,000 against loss by fire for one year "on merchandise generally, hazardous or extra hazardous, held by them or in trust," contained in a particular warehouse; they also took out a policy in the Home Insurance Company, to the amount of \$20,000, "on merchandise, hazardous or extra hazardous, their own, or held by them in trust, or in which they had an interest or liability," contained in the same warehouse. The appellants, on the 20th of June, 1870, deposited fifteen bales of cotton in the same warehouse, and received a receipt or certificate therefor from the warehouse company, and on the same day procured a policy of insurance on the cotton so deposited from the appellee. On the 27th of June they deposited thirteen bales, for which a like receipt was given, and on the same day they effected an insurance for the cotton with the appellee. Under the policies issued to the appellants, the loss, if any, was payable to the Baltimore Warehouse Company. The appellants had other cotton to a large amount stored with the warehouse company. The warehouse company advanced to the appellants over \$48,000 upon the cotton belonging to them, and stored in the warehouse. In the policies to the appellants, as well as in those to the warehouse company, it was stipulated that in case of loss the assured should not be entitled to recover on such policy any greater proportion of the loss or damage sustained to the subject insured than the amount thereby insured should bear to the whole amount of the several insurances thereon. On the 18th of July, 1870, the

¹ *Ramsay, &c. v. Mut. Fire Ins. Co.*, 11 Upper Canada, 516; *McMahon v. Portsmouth Fire Ins. Co.*, 2 Fost. (N. H.) 15; *Walton v. La. St. Mar. and Fire Ins. Co.*, 2 Rob. (La.) 563; *contra*, *Sloat v. Royal Ins. Co.*, 49 Penn. St. 14.

² *Vose v. Hamilton Mut. Ins. Co.*, 39 Barb. (N. Y.) 302.

³ 36 Md. 398.

warehouse was burned, and of the cotton stored therein some of the bales were saved, some were partially destroyed, and others totally destroyed. In an action by the appellants, for the use of the warehouse company, on the policies of insurance issued by the appellee, upon these facts it was held that the policies sued on having been made to the warehouse company inured to the benefit of the company, and might be considered as in favor of the same assured, on the same interest, in the same subject, and against the same risks as the policies which were issued directly to the warehouse company, and with the latter policies constituted a double insurance; and the companies therefore issuing the policies were bound to contribute their respective portions of the loss.¹ Where, however, one deposits goods covered by a floating policy with a warehouseman, who subsequently insures by a policy on goods "his own, in trust, or on commission," the latter is not a double insurance within the prohibition.² But where a ship was insured "for account of owners, as interest may appear," and two of the owners afterwards procured insurance, this was held to be additional insurance.³ And insurance upon the same life, applied for by the same person, though payable to a different person from the payee in a second policy, is other insurance within the meaning of a proviso making a policy void if there be other insurance undisclosed.⁴ The interests of mortgagor and mortgagee are distinct, and therefore insurance by a mortgagee of his interest at his own expense is not within the prohibitory clause of a prior policy in favor of the mortgagor. If, however, such insurance is at the expense of the mortgagor, and for his benefit, it is within the clause.⁵ The different interests of joint owners are likewise distinct.⁶

§ 367. **Other Insurance — Condition construed strictly.** — And this condition, like others working forfeitures, will be con-

¹ *Hough et al. v. People's Ins. Co.*, 36 Md. 398.

² *Donaldson v. Manchester Ins. Co.*, 14 Ct. of Sess. Cas. (Scotch) 601.

³ *Mussey v. Atlas Ins. Co.*, 4 Ker. (N. Y.) 79.

⁴ *Sparrow v. Mut. Ben. Life Ins. Co.* (U. S. C. Ct.), 1st Jud. Dist. (Mass.), *Shepley, J.*, tried in April, 1873, and not yet reported.

⁵ *Holbrook v. American Ins. Co.*, 1 Curtis (U. S. C. Ct.) 193.

⁶ *Franklin Mar. and Fire Ins. Co. v. Drake*, 2 B. Mon. (Ky.) 47. And see also *Burbank v. Rock. Ins. Co.*, 4 Fost. (N. H.) 550; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 518.

strued strictly. Thus, under a policy insuring a building, and prohibiting other insurance upon property "connected with it," insurance upon goods in the building is not other insurance, within the meaning of the prohibition.¹ And though the description of the property in the respective policies may cover, and apparently does cover, the same interests, it is a matter of evidence whether it does or not.² So where the same person had three several policies issued by separate offices on "a stock of dry goods contained in a four-story brick store," and afterwards obtained another policy from a different company on "a stock of merchandise contained in the chambers of a four-story brick and slated building," being the same building, it was claimed by the last company that as the goods lost were in the same building, they were liable only to their proportionate loss. But it being shown that when the first three policies were issued the plaintiff did not occupy the chambers, and had no goods there, — evidence held admissible as explanatory of a doubt as to what goods the several policies might apply, — the defendants were held to be liable for the whole loss on the goods in the chambers. This in fact was no additional insurance, but was as much an independent risk as if the goods had been in a different building.³

§ 368. Notice — What sufficient — When to be given. — Parol notice is sufficient, unless other notice be required.⁴ Notice must be within reasonable time, and need not be till a reasonable time has elapsed. What would be a reasonable time is a question for the jury,⁵ if the facts are in dispute, otherwise it is a question of law for the court.⁶ And notice given seven months after the destruction of the property is not within reasonable time. And so is an unexplained delay of nineteen

¹ *Jones v. Maine Mut. Fire Ins. Co.*, 18 Me. 155; *Illinois Mut. Ins. Co. v. O'Neil*, 13 Ill. 89.

² *Stacey v. Franklin Ins. Co.*, 2 W. & S. (Penn.) 506; *Clark v. Hamilton Mut. Ins. Co.*, 9 Gray (Mass.), 148.

³ *Storer v. Elliot Fire Ins. Co.*, 45 Me. 175.

⁴ *McEwen v. Montgomery County Mut. Ins. Co.*, 5 Hill (N. Y.), 101; *Schenck v. Mercer County Mut. Ins. Co.*, 4 Zab. (N. J.) 447.

⁵ *Jacobs v. Equitable Ins. Co.*, 19 Upper Canada, 250, 257.

⁶ *Kimball v. Howard Fire Ins. Co.*, 8 Gray (Mass.), 33.

days.¹ Notice erroneous in some particulars which are not necessary unless inquired for, if the amount of the other insurance be correctly given, is sufficient.² And it seems that notice should be given, when the subsequent insurance is applied for, a few days before the destruction of the property insured in the prior policy, but the policy is not delivered till after.³

§ 369. **Other Insurance — Notice in Writing — Indorsement on Policy.** — In many policies the notice of other insurance is required to be in writing and indorsed on the policy. And it has formerly been frequently held to be essential that these particulars should be literally complied with, and that verbal notice, or any thing short of the notice and the formalities subsequent thereto required by the condition, would subject the delinquent to forfeiture. Thus where the insured, after procuring subsequent insurance, gave a memorandum of it to the agent of the company which issued the prior policy, to be entered on the records, the policy not being at hand, the agent saying that such entry would answer every purpose, and the agent afterwards told the assured that he had made the entry, it was held that the condition was violated.⁴

§ 370. **Other Insurance — Notice — Consent in Writing.** — But the courts have become more liberal in favor of the assured in their construction of this sort of stipulation in policies of insurance. While, as we have seen, the old rule required the consent to be in writing and indorsed on the policy, it is the decided tendency of the modern cases to hold that if the notice be duly given to the company, or its agent, of the additional insurance, and no objection is made, the company will be estopped from insisting on a forfeiture of the policy, because their consent thereto was not indorsed, as literally required by the stipula-

¹ *Mellen v. Hamilton Fire Ins. Co.*, 17 N. Y. 609, affirming s. c. 5 Duer (N. Y. Sup. Ct.), 101.

² *Benjamin v. Saratoga County Mut. Ins. Co.*, 17 N. Y. 415.

³ *Inland Ins., &c. Co. v. Stauffer*, 33 Penn. St. 397.

⁴ *Worcester Bank v. Hartford Fire Ins. Co.*, 11 Cush. (Mass.) 265. And see also *Conway Tool Co. v. Hudson R. Ins. Co.*, 12 Cush. (Mass.) 144; *Pendar v. American Mut. Ins. Co.*, ib. 469; *Forbes v. Agawam Ins. Co.*, 9 Cush. (Mass.) 470; *Stark County Mut. Ins. Co. v. Hurd*, 19 Ohio, 149; *Carpenter v. Prov. Wash. Ins. Co.*, 16 Pet. (U. S.) 495; *Hale v. Mechanics' Mut. Ins. Co.*, 6 Gray (Mass.), 169.

tion.¹ An office which issues a subsequent policy will be presumed to have notice of the prior one.² And where both policies are negotiated through the same person, who is agent for both companies, his knowledge is the knowledge of each company.³ But the knowledge of the broker through which both insurances are effected, is not the knowledge of the insurers.⁴

§ 371. **Other Insurance — Approval — Consent.** — Where the approval of other insurance is required in writing, a letter from the secretary of the insurers, in reply to a notice from the insurer, and stating that he has received the notice of additional insurance, is an approval in writing within the meaning of the condition. Thus where, in case of further insurance, the insured is to give notice thereof to the company, and have the same indorsed on the policy, or otherwise acknowledged or approved by them in writing, and such insurance is obtained; notice whereof is immediately given to the secretary of the company, who acknowledges by letter the receipt of the notice, without more, this has been held to be an approval in writing. "It is said," was the language of the court, "this was no approval. That may be true if we look only at the literal reading of the answer which the defendants gave to the notice. But I take the rule to be that a writing contains all that may be fairly implied from it; and it is difficult to read the answer without inferring that the defendants meant to approve as well as acknowledge the notice of further insurance. What else could the defendants have intended? They say to the plain-

¹ *Thompson v. St. Louis Mut. Life Ins. Co.*, Sup. Ct. Mo., 2 Ins. L. J. 422; *Hayward v. National Ins. Co.*, Sup. Ct. Mo., 2 Ins. L. J. 503, overruling *Hutchins v. Western Ins. Co.*, 21 Mo. 97; *Horwitz v. Equitable Mut. Ins. Co.*, 40 Mo. 557; *Franklin v. Atlantic Fire Ins. Co.*, 42 Mo. 456; *Combs v. Ham. Sav. and Ins. Co.*, 43 Mo. 148; *Northup v. Miss. Val. Ins. Co.*, 47 Mo. 435; *Viele v. Germania Ins. Co.*, 26 Iowa, 55; *Walsh v. Aetna Life Ins. Co.*, 30 Iowa, 133; *Van Bories v. United Life, Fire and Mar. Ins. Co.*, 8 Bush (Ky.), 133; *Peck v. New London County Mut. Ins. Co.*, 22 Conn. 575; *Hutton v. Beacon Ins. Co.*, 16 Upper Canada (Q. B.), 316; *National Fire Ins. Co. v. Crane* (in equity), 16 Md. 260.

² *Barnes v. Union Ins. Co.*, 45 N. H. 21; *Horwitz v. Equitable Ins. Co.*, 40 Mo. 557.

³ *Van Bories v. United Life, &c., Ins. Co.*, 8 Bush (Ky.), 133.

⁴ *Mellen v. Hamilton Mut. Fire Ins. Co.*, 17 N. Y. 609, affirming s. c. 5 Duer (N. Y. Superior Ct.), 101.

tiff, 'We have received your notice of additional insurance,' and then stop. There was no disapproval, nor was there any suggestion that the matter was reserved for further consideration. The plaintiff could not but understand from the answer that the notice, or the further insurance, if such be the true reading of the clause, was 'acknowledged and approved,' and that nothing further remained to be done."¹ And where the consent of the directors is required, it need not be signified by formal vote, or even in writing, but may be inferred from the proof of other facts, as of their knowledge of all the facts, where two directors in one company, being also directors in another company, took the additional insurance. So if it be required that prior insurance be indorsed on the subsequent policy when it issues, leave to keep insured to an amount greater than is stated in the policy thus issued, indorsed on the policy, is the equivalent of such indorsement, as it may refer to prior as well as subsequent insurance.² So is the fact that the prior insurance is stated in the policy.³ Assent to subsequent insurance is also assent to a renewal of the same in the same or any other office.⁴ And notice of prior insurance in the application for a subsequent policy is notice of a renewal of the prior insurance.⁵ But in Massachusetts,⁶ in a case where the insurance was not a renewal strictly, but an insurance in another company, to take the place of an insurance which had been assented to, though for a less amount, it was held that the assent did not apply to the substituted insurance. But notice of "changes in additional insurances" is sometimes required by the terms of the policy.⁷ In Sykes

¹ Per Bronson, J., *Potter v. Ontario and Liv. Mut. Ins. Co.*, 5 Hill (N. Y.), 147; *Robertson v. French*, 4 East, 135.

² *Blake v. Exch. Ins. Co.*, 12 Gray (Mass.), 148; *Philbrook v. New England Mut. Ins. Co.*, 37 Me. 137; *Kimball v. Howard Fire Ins. Co.*, 8 Gray (Mass.), 33; *Benedict v. Ocean Ins. Co.*, 1 Daly (N. Y. Sup. Ct.), 8; *Warner v. Peoria Mar. and Fire Ins. Co.*, 14 Wis. 318.

³ *Baptist Soc. v. Hillsborough Mut. Fire Ins. Co.*, 19 N. H. 580; *Ames v. New York Union Ins. Co.*, 14 N. Y. 258.

⁴ *Baptist Soc. v. Hillsborough Mut. Fire Ins. Co.*, 19 N. H. 580.

⁵ *Brown v. Cattaraugus County Mut. Fire Ins. Co.*, 18 N. Y. 385.

⁶ *Burt v. People's Mut. Ins. Co.*, 2 Gray (Mass.) 397.

⁷ *Simpson v. Penn. Fire Ins. Co.*, 38 Penn. St. 250.

v. Perry County Mutual Fire Insurance Company,¹ the distinction is taken between notice and knowledge of an alteration, at least so far as an agent is concerned, that while knowledge of the agent is not knowledge of the company, notice to the agent would be notice to the company. But knowledge of the agent of a fact existing at the time insurance is effected, is knowledge of the insurers.² And this knowledge runs through all renewals of the same insurance.³

§ 372. **Other Insurance—Waiver of Forfeiture for breach of Condition.**—But, as has already been seen,⁴ forfeiture by reason of a breach of the condition may be waived by any act of the insurers recognizing the validity of the policy after knowledge of a breach of the condition. A failure to give notice of such insurance, when in fact it is already known to the insurers themselves, as where they have issued a prior but still outstanding policy on the same property, will not avoid the policy, the issue of the subsequent policy with knowledge being a waiver of the condition.⁵ And if the company have a right to avoid after notice of breach, and neglect so to do for an unreasonable time, it will be a waiver of the forfeiture.⁶

§ 373. **Overvaluation.**—Akin to the subject of double or over insurance is the subject of overvaluation, which in fact is more properly over insurance. This is sometimes prohibited in the policy on pain of forfeiture, sometimes stated as a restriction upon the relative amount of the value which the insurers will assume the risk of, and sometimes not mentioned at all in the policy. The same reasons exist on the part of the insurers against overvaluation that we have already stated exist against double insurance. In both cases the interest of the insured in the preservation of the property is weakened, and motives supplied to desire its destruction. And it is not unusually stipulated against. But an overstatement of the value of

¹ 34 Penn. St. 79.

² *People's Ins. Co. v. Spenser*, 53 Penn. St. 353.

³ *Ibid.*; *Liddell v. Market Fire Ins. Co.*, 4 Bosw. (N. Y.) 179.

⁴ *Ante*, §§ 143, 365.

⁵ *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Wash. Ins. Co. v. Davidson*, 30 Md. 91.

⁶ *Van Bories v. United Life, Fire and Mar. Ins. Co.*, 8 Bush (Ky.), 135.

the property for insurance upon which application is made, will defeat the policy, whether there be any condition or stipulation in the policy to that effect or not. It is a material fact in that it is of importance that the insured should be interested in the protection of the property. The smaller the amount of the insurance, therefore, the stronger his interest in the protection. The probable loss, in case of the destruction of the property by fire, is the incentive to vigilance in the protection of the whole, as well that which is covered by the policy as that which is not; for whatever threatens the interest of the insurers threatens also the interest of the insured. But the law will not here interest itself in trifling discrepancies and insignificant differences, such as may be readily accounted for by that natural tendency to overestimate which self-interest always engenders. The overvaluation, in order to work a forfeiture of the right of recovery, must be a clear one; so clear that it is obvious at a glance, and cannot be accounted for upon the principle that every man is naturally prone to put a favorable estimate upon his own. It is not necessary that the overvaluation be intentional and fraudulent to have the effect of vitiating the policy. The effect is the same if it be done by mistake, and overvaluation by the agent is imputable to the principal.¹ It is usual to provide that fraudulent overvaluation shall avoid the policy; and, in point of fact, whether the provision be against fraudulent overvaluation or simply overvaluation, it is of but little moment. For no overvaluation but a gross and clear one, and such as is or must be presumed to be known to be such by the insured, and therefore false and fraudulent, will in either case be held to vitiate the policy; and such a one will avoid the policy whether provided against or not.²

§ 374. **Overvaluation.** — But the rule as to overvaluation is

¹ *Carpenter v. American Ins. Co.*, 1 Story (U. S. C. Ct.) 57; *Catron v. Tenn. Ins. Co.*, 6 Humph. (Tenn.) 176; *Carpenter v. Prov. Wash. Ins. Co.*, 16 Pet. (U. S.) 495; *Shaw v. St. Lawrence County Mut. Ins. Co.*, 11 Upper Canada (Q. B.), 73.

² *Hersey v. Merrimack County Mut. Ins. Co.*, 7 Fost. (N. H.) 149; *Dickson v. Equitable Fire Ins. Co.*, 18 Upper Canada (Q. B.), 246; *Wilbur v. Bowditch Mut. Ins. Co.*, 10 Cush. (Mass.) 446; *Prot. Ins. Co. v. Hall*, 15 B. Mon. (Ky.) 411.

not applicable to the case of an open policy upon a stock of goods which is constantly varying in amount, nor where the insurer is to be liable only for a proportion of the loss. Thus, where a merchant procures insurance upon his stock of goods, and fixes the valuation neither upon the reduced stock which he happens to have on hand at the end of the busy season when the insurance is applied for, nor upon the unusually large stock on hand at the commencement of the season, but upon a fair average between the two, this is permissible, because it is within the intention of the parties, although the incentives to vigilance, and the temptation to destroy on the part of the insured, may vary with the varying amount of the stock. So if the insurer is in no case to be responsible beyond a certain fixed proportion, as for instance two-thirds of the loss, the insured has always before him the same unvarying proportion of the risk, and the usual objections to overvaluation do not obtain.¹

§ 375. **Overvaluation — Renewals upon changing Stock.** — It may happen that under repeated renewals of insurance, without any change in the application, upon the same property, a depreciation in its value may take place, so that the representations as to its value at the time of the first insurance may not be strictly true at the date of the last insurance. But such a variance is no fraudulent overvaluation or misrepresentation.²

§ 376. **Restriction of Value by Charter or By-laws or Terms of the Policy.** — The charters of mutual insurance companies usually restrict the amount of the risk which they are permitted to assume to a certain proportion of the value of the property insured. In such cases the restriction is to be regarded as directory merely, and not prohibitory. The violation of the charter is a matter for the insurers to settle with those who gave them their charter, but they cannot set up their own misconduct in defence against the claim of the insured for indemnity, as by showing that in insuring to the stipulated amount they have infringed one of their own by-laws.³ An

¹ *Lee v. Howard Fire Ins. Co.*, 11 Cush. (Mass.) 324.

² *Gerhausen v. North Brit. and Mer. Ins. Co.*, 7 Nev. 174.

³ *Cumberland Valley Mut. Prot. Ins. Co. v. Schell*, 29 Penn. St. 31; *Hossie*

estimate, whether by the agent of the insurers or by him and the insured combined, in the absence of all fraud, collusion, and misrepresentation, fixed by agreement, an estimate upon which premiums are paid and assessments laid, and the amount to be paid by the company in case of loss determined, is the best evidence of the value of the premises insured, and cannot be treated as a valuation not permitted by the charter or by-laws.¹

v. Prov. Mut. Fire Ins. Co., 6 R. I. 517; *Fuller v. Boston Fire Ins. Co.*, 4 Met. (Mass.) 206. And see *ante*, §§ 23, 63, 65.

¹ *Fuller v. Boston Fire Ins. Co.*, 4 Met. (Mass.) 206; *Wilbur v. New England Mut. Fire Ins. Co.*, 31 Me. 219.

CHAPTER XVII.

OF THE ASSIGNMENT OF THE POLICY.

§ 377. *Assignment of Policy* — Not permitted by the Common Law. — We have already considered, in the chapter on alienation, the effects of a transfer of the property insured. We are now to consider the effect of a transfer of the policy of insurance, or, as it is usually termed, the assignment of the policy. It is usual to provide that if the policy be assigned without the consent of the insurers, it shall be void. At common law a policy of insurance against fire is not assignable in any such sense as to give the assignee a right to sue in his own name. By an assignment the assignee acquires merely a *chose in action*, giving to the holder at most an equitable claim, which he can assert and enforce only in the name of the assignor. With a very few exceptions, as in the case of bills of exchange, bills of lading, and policies of marine insurance, the common law has steadily denied the right of one man to make over his right of action against another to a third party, a stranger to the contract, as against public policy, and tending to the multiplication of suits. In the case of marine policies, custom seems to have established a rule different from that of the common law, and to have made the policies transferable with the subject-matter of insurance. In fact, in early times, in marine insurance, policies were issued in blank as to the assured, and passed from hand to hand without indorsement or assignment, but merely by delivery, like a promissory note payable to bearer, along with the thing insured. And to this day, if there be an assignment of the policy, coupled with a transfer of the subject-matter of insurance, although there be no consent of the insurers to either the assignment or the transfer, the assignee thereby acquires a claim against the insurers, which he can enforce in a suit at law in his own name. This distinc-

tion is said to rest upon the fact that there is less of mere personal consideration, in regard to the risk, in marine insurance than in fire, and that practically, if not theoretically, the insurance here is rather of the thing than of the particular owner; while in fire insurance, on the contrary, it is rather of the owner than of the thing, the character of the owner as a man of prudence, integrity, and watchfulness entering much more largely as an element into the estimate of the risk. Commercial convenience also doubtless has much to do with the distinction.¹ But whatever may be the grounds of the distinction, it is certain that it exists; and while marine policies have always been held assignable without the consent of the insurers, the contrary has always been and still is the law with reference to fire policies.²

§ 378. **Different Modes of Assignment, and their Effects.** — Though, strictly speaking, no assignment of the policy can be made, yet there are certain transfers of it which are often made, which have a validity recognized by the courts, and which, according as they are effected by mere delivery or in writing, and with or without the transfer of the property upon which they are issued, and with or without the consent of the insurers to the transfer of the policy and the property, are attended by different consequences. In the case of *Fogg v. Middlesex Mutual Fire Insurance Company*, some exceedingly valuable observations were made upon the general subject, as well as upon the different modes of assignment and their effect, which we give in the language of the court, per Shaw, C. J. : —

“As a policy of insurance is not a negotiable instrument, it cannot be legally transferred so as to enable the assignee to maintain a suit in his own name without the consent of the other party. But in general, at the common law, where one party assigns all his right and interest in the contract, and the assignee gives notice to the other party to the contract, and he agrees to it, this constitutes a new contract between one of

¹ And see also *post*, § 380.

² *Etna Fire Ins. Co. v. Taylor*, 16 Wend. (N. Y.) 385; *Columbian Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 25; *Lynch v. Dalzell*, 4 Brown, P. C. 431; *Simeral v. Dubuque Mut. Fire Ins. Co.*, 18 Iowa, 319.

the original parties and the assignee of the other, the terms of which are regulated and fixed by those of the original contract. This rule applies to policies as well as other contracts, and it is often convenient and desirable to apply it; and there are two cases where this application frequently happens.

“The first is, when the insured property is alienated or sold by the assured. After such sale, if nothing more is done, no surrender or change of the policy, and the goods should be burnt, nobody could recover on the policy; not the original assured, for he has sustained no loss, the property was not his, and the loss of it was not his loss; not the purchaser, because he has no contract with the company. And although in popular language the goods are said to be insured against loss by fire, yet, in legal effect, the original assured obtains a guaranty by the contract that he shall sustain no damage by their destruction by fire. But in case of such sale or alienation of the insured property, the original assured having no longer any interests in the policy, except to claim a return of premium, if he will assign his policy, or his contract of insurance to such purchaser, and the company assent to it, here is a new and original contract, embracing all the elements of a contract for insurance between the assignee and the insurers. The property having become the purchaser's, is at his risk, and if burnt, it is his loss, and he has a good original contract, upon a valid consideration, to guarantee him against such loss. Accordingly, provision is made in the charter and by-laws, and also by the terms of the policy, for an assignment of the contract. The company returns no part of the premium, but the assignee has the benefit of it upon such terms as he and his assignor may determine; the assignment is indorsed on the policy and presented to the president of the company, who ordinarily is authorized to give the assent of the company to the assignment; the old deposit note is surrendered, and a new deposit note given by the assignee.

“In the regulations of this company in a circular of instruction to agents, a form is given for such transfer, notifying the sale of the property, naming the purchaser, and assigning to such purchaser, his executors, &c., the policy of insurance, and,

in case of loss, directing the amount to be paid to the said purchaser, his heirs, &c. Upon each assignment perfected there is an entire change in the contract, in the party contracted with, in the insurable interest in the property at risk; and it becomes an insurance on the property of the assignee, and ceases to be a contract of insurance of the property of the assignor.¹

“ But there is another species of assignment, or transfer it may be called, in the nature of an assignment of a *chose in action*. It is this: ‘ In case of loss, pay the amount to A. B.’ It is a contingent order or assignment of the money, should the event happen upon which money will become due on the contract. If the insurer assents to it, and the event happens, such assignee may maintain an action in his own name, because, upon notice of the assignment, the insurer has agreed to pay the assignee instead of the assignor.² But the original contract remains; the assignment and assent to it form a new and derivative contract out of the original. But the contract remains as a contract of guaranty to the original assured; he must have an insurable interest in the property, and the property must be his at the time of the loss. The assignee has no insurable interest *prima facie*, in the property burnt, and does not recover as the party insured, but as the assignee of a party who has an insurable interest and a right to recover, which right he has transferred to the assignee, with the consent of the insurers.”³

§ 379. **What is, and what is not, an Assignment of a Policy.**— Having recognized that certain acts may amount to what has come to be treated as an assignment of the policy, the courts have been called upon to consider the question what constitutes an assignment of the policy within the meaning of the condition which prohibits it without the assent of the insurers, and under such condition will work a forfeiture. And here-upon the cases are numerous. Not every assignment which

¹ See also *Foster v. Eq. Mut. Ins. Co.*, 2 Gray (Mass.), 216.

² *Mowry v. Todd*, 12 Mass. 281.

³ See also *Wilson v. Hill*, 3 Met. (Mass.) 66; *Carpenter v. Prov. Wash. Ins. Co.*, 16 Pet. (U. S.) 495; *Pratt v. N. Y. Central Ins. Co.*, 64 Barb. (N. Y.) 589.

gives such rights as a court of law or equity would feel bound to recognize and protect would amount to an assignment which works a forfeiture. The rule in the former case would doubtless be one of liberality in favor of the assignee, while in the latter it would be one of strictness against the insurers.¹ An alienation or transfer of the property is not of itself an assignment of the policy, does not carry the policy with it, nor is it necessary to the validity of an assignment of the policy.² Nor is an alienation of the property after the loss made in execution of a contract entered into before the loss, coupled with an agreement to assign the policy ;³ nor a mortgage of a stock of goods insured, coupled with an agreement to hold the policy for the benefit of the mortgagee, an assignment of the policy within the meaning of a condition that the policy is to be void if assigned without the consent of the insurers ;⁴ nor an unexecuted agreement to assign, whether by parol⁵ or in writing ;⁶ nor is a pledge of the policy as collateral security ;⁷ nor is a general assignment of all personal property for the benefit of creditors ;⁸ nor is a designation in the policy of a certain person not interested in the property — a stranger — as payee in case of loss an assignment within the meaning of such a condition ;⁹ nor is an indorsement on the back of the policy to that effect assented to by the insurers.¹⁰ And where the policy is merely made payable in case of loss to the mortgagee, this is no assignment of the policy. Nor does it convert the policy into a contract of insurance with the mortgagee ; and he is liable to all the defences against the policy to which the applicant would be.

¹ *Lazarus v. Com. Ins. Co.*, 5 Pick. (Mass.) 76.

² *Phillips v. Merrimack Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 350; *Stout v. City Fire Ins. Co.*, 12 Iowa, 371.

³ *Wheeling Ins. Co. v. Morrison*, 1 Leigh (Va.), 354; *Pierce v. Nashua Mut. Fire Ins. Co.*, 50 N. H. 297.

⁴ *Prows v. Ohio Val. Ins. Co.*, 2 Cincinnati Superior Court Reporter, 14.

⁵ *Cromwell v. Brooklyn Fire Ins. Co.*, 39 Barb. (N. Y.) 227.

⁶ *Smith v. Monmouth Mut. Fire Ins. Co.*, 50 Me. 96.

⁷ *Ellis v. Kreutginger*, 27 Mo. 311.

⁸ *People v. Beigler, Hill & Denio* (N. Y.), 133; *Lazarus v. Com. Ins. Co.*, 5 Pick. (Mass.) 76.

⁹ *Frink v. Hampden Ins. Co.*, 45 Barb. (N. Y.) 384; *Birdseye v. City Fire Ins. Co.*, 26 Conn. 165.

¹⁰ *Fogg v. Middlesex Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 337.

He is subject to all the conditions of the policy, and takes the risks growing out of the acts or conduct of the insured, even though by the terms of the policy loss is to be paid to the assignor, as his interest may appear; and the assent of the insurers does not operate to produce a new contract between them and the assignee, but merely to save the policy from forfeiture. The insurers are only bound to pay to the mortgagee what may be found due the insured in case of loss; and if he by his conduct, by alienation, or otherwise, has forfeited the right to recover, there is nothing to be paid the mortgagee.¹ In such cases, whether the transfer be to a stranger or to the mortgagee, the assignment is a mere equitable transfer of the right to receive any sum that may be due in the event of a loss. But while such mortgagee is not an assignee, the promise to pay to him in case of loss, though not an assignment to work a forfeiture, is so far an assignment, and gives to the mortgagee such rights under the policy, that, in the absence of any special provision in the policy with reference to arbitration in case of loss, the mortgagor and insurer cannot conclude the mortgagee by a reference of the claim for loss to arbitration.² So, where a policy with the insurer's consent has been assigned to a mortgagee.³ Though there are respectable authorities that the assignee under such circumstances is no longer responsible for the defaults of the assignor, and has greater rights than he,⁴ yet these cases rest upon the authority of The

¹ *Loring v. Manufacturers' Ins. Co.*, 8 Gray (Mass.), 28; *Home Mut. Ins. Co. v. Hanslein*, Sup. Ct. Ill., 1 Ins. L. J. 818; *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 91; overruling on this point s. c. 1 Bosw. (N. Y. Superior Ct.) 469, and 5 Duer (ib.), 517; *Trader's Ins. Co. v. Robert*, 9 Wend. (N. Y.) 404; and *Tillou v. Kingston Mut. Fire Ins. Co.*, 1 Seld. (N. Y.) 405; s. c. 7 Barb. (N. Y.) 570.

² *Brown v. Hartford Ins. Co.*, 5 R. I. 394; *Same v. Roger Williams Ins. Co.*, *ibid.*

³ *State Mut. Fire Ins. Co. v. Roberts*, 31 Penn. St. 438; *Edes v. Hamilton Mut. Ins. Co.*, 3 Allen (Mass.), 362; *Buffalo Steam-Engine Works v. Sun Mut. Ins. Co.*, 17 N. Y. 401; *Lawrence v. Holyoke Ins. Co.*, 11 Allen (Mass.), 387; *Peepke v. Resolute Fire Ins. Co.*, 17 Wis. 378; *Hoxsie v. Prov. Mut. Ins. Co.*, 6 R. I. 517.

⁴ *Pollard v. Somerset Mut. Fire Ins. Co.*, 42 Me. 221; *New England Fire and Mar. Ins. Co. v. Wetmore*, 32 Ill. 221; *City Fire Ins. Co. of Hartford v. Mark*, 45 Ill. 482.

Traders' Insurance Company *v.* Roberts, and the other New York cases following that, all of which, as we have just seen, have been overruled.¹ And it has even been held that this would be the case where the insurers were notified of the intention of the insured to assign at the same time the policy was issued, to which they assented, but no assignment was actually made till after a loss.² But this case stands alone, and rests upon the same overruled New York cases,³ and cannot be law. Nor is a transfer of an undivided interest in the property insured to a third party, as by taking in a partner, coupled with the written consent of the insurers that the policy shall remain good to the insured and to the alienee, and an entry by the insurers in their books recognizing such alienee as a member of the company, an assignment of the policy within the meaning of a provision that the alienee of the property insured, having the policy assigned and ratified to him by the company, should be entitled to all the rights and privileges of the original insured, so as to enable the alienee to sue in his own name.

§ 380. **Assignment in Whole or in Part.** — An assignment of a policy as collateral security avoids a policy which stipulates against an assignment in whole, or of any interest in it, under penalty of forfeiture. The suggestion sometimes made that as such an assignment cannot injure the insurers, it cannot be supposed that the insurers meant to prohibit under such a provision, is not sound. It may injure him in two ways. In the first place, incumbrances are objectionable, and are usually inquired after; for, as they increase, the interest of the owner of the property in its preservation diminishes. True, if honest, he is interested in the payment of his debts. But this is a different interest from that which a man feels in the preservation of the property, — the interest in which insurers are more particularly concerned, — which he can continue to enjoy, and which belongs to him and not to his creditors. Most men will look more vigilantly to the preservation of property which, if saved,

¹ See also *State Mt. Fire Ins. Co. v. Roberts*, 31 Penn. St. 438.

² *Charleston Ins. & Trust Co. v. Neve*, 2 McMullan (S. C.), 237.

³ 7th of Wendell, *supra*.

they can enjoy, than to the preservation of that which, if destroyed, will merely reduce their ability to pay their debts. If the privilege of transferring the policy as collateral security for goods purchased, or money borrowed, tends to the increase of incumbrances, the company has a motive to prohibit it. That it does so tend is matter of common experience. A mortgage covering the value of the property, accompanied by a transfer of the policy, is worth just as much more in consequence of such transfer as the value of the policy itself. But in another and more important manner does such a transfer injure the insurer. It may create an interest directly hostile to him. If the assignee be a second or third incumbrancer, his interest may be for the destruction of the property. The owner cannot be insured to the entire value, nor a stranger to it to any amount whatever; since in neither case would there be any interest to preserve, and, in the last case, no interest but to destroy. But this interest of a stranger to destroy may be the same as that of such incumbrancer. If the buildings are preserved, the lien before him will take their value; if destroyed, he will get it; and the circumstances may be such that he will get nothing else, as when the preceding liens cover the entire value of the property. But suppose the property be on account of indebtedness without lien. Then the only way in which it can be of any value is through the destruction of the property.¹

§ 381. **Assignment — Transfer of Interest.** — No transfer of interest will work a forfeiture under the clause contained in a policy forbidding a transfer of “the interest of the assured in the policy, or in the property insured” thereby, without the written consent of the company, which does not so deprive the assignor of all insurable interest as to prevent his recovery on the policy for his benefit if that clause was not contained in it. To take away the cause of action in one case, and to render void the policy in the other, equally require a transfer or *termination* of the entire insurable interest. So long as the insured retains such an interest that he may suffer loss, the

¹ Ferree v. Oxford Fire Ins. Co., 8 Phila. Rep. 512.

policy protects that interest.¹ Where the transfer of the entire interest of the insured in the policy, or in the property insured, is forbidden, under penalty of forfeiture, without the consent of the company, if there be a sale of the property insured, but without assignment of the policy to the purchaser, in that case the vitality, or rather activity, of the policy as the means of securing an indemnity becomes suspended; not from any vice in the policy, but for want of any subject-matter to which it may attach. If a fire occurs during the period of suspension, no recovery can be had under the policy; not because it has become void, but because at the time of the fire the insured has no property covered by it, and the purchaser has no policy to cover his interest. The moment, however, the interests become united by the union of the ownership of the property and the interest in the policy in the same person, the policy reattaches to the goods, and becomes valid and effectual to protect the property to which it so reattaches.² And where the assignment of the policy, with the consent of the insurers, is absolute to one who has become the entire owner of the subject of insurance, it becomes a new contract of insurance between the underwriters and the assignee. If the assignment, taken in connection with the policy, plainly transfers the assured's whole interest, the underwriter's consent to it is evidently equivalent to the agreement to become directly answerable to the assignee. In such cases the proceedings to enforce payment may be in the assignee's hand; and he becomes to all intents and purposes the substituted party to the contract.³

Assignment — "Interest of the Assured in the Policy." — In a case where it is provided that the "interest of the assured in the policy" should not be assignable, without consent, and

¹ *Shearman v. Niagara Fire Ins. Co.*, 2 Sweeney (N. Y. Superior Ct.), 474; *Fessenden v. Great West. Ins. Co.*, 3 Rob. (ib.) 458; *Van Deuzen v. Charter Oak Ins. Co.*, 1 Rob. (ib.) 55; *Phelps v. Gerhard Fire Ins. Co.*, 9 Bosw. (ib.) 405; *Hitchcock v. North Western Ins. Co.*, 26 N. Y. 68.

² *Ibid.*

³ The court rely upon *Hooper v. Hudson River Fire Ins. Co.*, 17 N. Y. 424; *Wolfe v. Security Fire Ins. Co.*, 39 N. Y. 51; both of which were cases of insurance upon stocks of goods kept for sale, and constantly undergoing a change. But the court thought the same rule ought to apply to the insurance of a house.

in case of the transfer or termination of the interest of the insured without consent the policy should be void, it was held that the latter interest spoken of is the same as the first, and that an assignment of the policy was an assignment of that interest, was itself null and void, and avoided the policy also.¹ But about the same time, and doubtless without having seen the case from New York, Mr. Justice Story, in giving the opinion of the court in *Carpenter v. Providence Washington Insurance Company*,² said that the interest last spoken of was “manifestly the interest of the owner in the premises insured, and not merely the interest in the policy.”

§ 382. **Assignment by Consent — Assignment with Assent — Legal Effect.** — The purpose for which an assent to the assignment is required is, as we have seen,³ that the insurers may have an opportunity to know who is to become interested in the policy, and so more or less in the destruction or preservation of the property insured, — the character of the person so interested being oftentimes an important element in the estimation of the risk. It is no part of its purpose to enlarge the engagements of the insurers, nor to waive the conditions on the performance of which their liability depends. It is not to give new privileges to the insured, which without it he would not have, but it is solely for their protection. The assignment does not change the contract. It simply converts one of the parties into a trustee for a third person, and every condition upon which the liability to pay is made to depend remains as before. Were it not so, it would not be an assignment, but a new contract.⁴ The legal effect of an assignment to a stranger with the consent of the insurers, by a mortgagee, to whom the policy, issued upon the property of the mortgagor, is made payable in case of loss of all his interest in the policy, is not to assign the policy, but merely to hold the insurers to the payment to the assignee in case of loss, whatever the person originally insured by the policy may be entitled to receive.

¹ *Smith v. Saratoga County Mut. Fire Ins. Co.*, 1 Hill, 497; s. c. affirmed, 3 Hill (N. Y.), 508.

² 16 Pet. 495.

³ *Ante*, §§ 377, 380.

⁴ *State Mut. Fire Ins. Co. v. Roberts*, 36 Penn. St. 438; *Buckley v. Garrett et al.*, 47 Penn. St. 204.

It is only a contingent order or assignment of what may become due under the contract, and not an absolute transfer by virtue of which the assignee acquires the full rights of an assignee of a *chose in action*. The original contract with the mortgagor still subsists, and it is his interest which is insured. The assignee must claim in his right and not in his own. It is only what the mortgagor may have a right to receive under the contract that the assignee can in any event claim. If, therefore, the mortgagee, before the loss happens, violates a provision of the policy whereby he forfeits the right to recover, his assignee is equally barred of his remedy.¹

§ 383. **Assignment — What is an Assent.** — The assent to an assignment of the policy by the secretary of the insurers is sufficient, unless prohibited by the charter or by-laws. He will be presumed to be acting within the scope of his authority in so doing. And this is true although by the charter policies must be signed by the president.² So where the assent and approval of the directors is requisite to the validity of the assignment of a policy, and it is brought to their knowledge that the secretary has assented to such assignment, by an entry of the fact in the company's books and an indorsement upon the policy, this will be a sufficient assent and approval on the part of the directors, and a formal vote is not necessary.³ The habit of the president or secretary giving such assent, known to the directors, and not objected to by them, is equivalent to an express vote.⁴ Indeed, that any particular officer of the company has been in the habit, known to the directors, of attending to any particular branch of the business, or of doing any particular class or kind of acts in the management of the business, is enough to give the acts validity, as done with the assent and approval of the directors, there being no stipulation or rule known to the party who sets up the validity of the act that such assent must be in writing.⁵ And an agent of the insurers may bind the company by an assurance that the pol-

¹ *Hale v. Mechanics' Mut. Fire Ins. Co.*, 6 Gray (Mass.), 169.

² *New England Mar. Ins. Co. v. De Wolf*, 8 Pick. (Mass.) 56.

³ *Durar v. Hudson County Mut. Ins. Co.*, 4 Zab. (N. J.) 171.

⁴ *Phillips v. Merrimack Mut. Fire Ins. Co.*, 10 Cush. 350.

⁵ *Topping v. Bickford*, 4 Allen (Mass.), 120.

icy will remain good after transfer of title till a certificate of consent to an assignment of the policy can be obtained from the company, though the transfer without consent avoids the policy.¹ And a designation in the policy of the payee has been held to be the equivalent of an assent, required to be by indorsement on the policy, to an assignment so as to prevent a forfeiture on account of a subsequent assignment;² and in *Keeler v. Niagara Fire Insurance Company*,³ such a designation written across the face of the policy was regarded as the equivalent of an assignment, or rather rendered an assignment and notice unnecessary in order to keep alive the policy. And insurance of partnership property is an assent to all such changes in the relation of the individuals of the firm to the property, whether by death or dissolution, as by law follow such events.⁴ And in some cases it has been held that the issuing a policy payable to a third person is tantamount to an assent in advance to the assignment;⁵ and so, also, that the indorsement of the same provision has the same effect.⁶

§ 384. **Cure of void Policy by Assent to Assignment.** — But an assent to an assignment after forfeiture because of alienation does not restore a policy originally void on other grounds. The authority conferred by the by-laws of a mutual insurance company upon the directors to ratify and confirm assignments in cases of the sale or alienation of the property insured, applies only to policies which are made void by such alienation, and not to such as were originally void; and the assent, therefore, to the assignment of a policy, originally void, after an alienation and for the purpose of ratifying it, does not cure the original infirmity in the policy.⁷

§ 385. **Assignment — Consent in Writing — Fraud.** — If the assent to an assignment be procured by fraud, it is like all

¹ *Illinois Mut. Fire Ins. Co. v. Stanton*, Sup. Ct. Ill., 1872, 2 Ins. L. J. 29.

² *National Fire Ins. Co. v. Crane*, 16 Md. 260.

³ 16 Wis. 523.

⁴ *Wilson v. Genesee County Mut. Ins. Co.*, 16 Barb. (N. Y.) 511.

⁵ *Brown v. Roger Williams Ins. Co.*, 5 R. I. 394; *Bidwell v. St. Louis Floating Dock Ins. Co.*, 40 Mo. 42.

⁶ *National Fire Ins. Co. v. Crane*, 16 Md. 260; *Franklin v. National Ins. Co.*, 43 Mo. 491.

⁷ *Eastman v. Carrol Co. Mut. Fire Ins. Co.*, 45 Me. 307.

other contracts thus procured, voidable, and may be repudiated. But if, after knowledge of the fraud, it is treated by the insurer as a valid assignment, as by demanding and receiving assessments for losses and expenses subsequent to the fraud under it from the assignee, this will waive the fraud. But a failure to state the interest of the assignee, certainly, if not asked, is no fraud.¹ If the assent to the assignment is by the terms of the policy to be in writing, it must be strictly complied with, unless there be a waiver; and knowledge that an assignment is contemplated by the assured, the mortgagor, to the mortgagee, without objection, is no consent. The only fair inference from such facts is a tacit agreement that the company would consent when the mortgagee had put himself in a position to ask it.² If its validity be dependent upon depositing a note with the secretary or agent, to be approved by the directors, leaving the note with the agent, who neglects to notify the company, is not a compliance with the conditions.³

§ 386. But this inhibition of an assignment without consent applies only to an assignment before the loss. An assignment after the loss is not the assignment of the policy, but the assignment of a claim or debt, a *chose in action*, which is always assignable in equity.⁴ And a prohibition of an assignment after the loss is invalid, and void as contrary to law.⁵

§ 387. Assignment — Limitation as to Time — Consent arbitrarily withheld. — *Boynton v. Farmers' Mutual Insurance Company* was a case where the policy provided that upon alienation of the property the policy should be void, but that

¹ *Cumberland Valley Mut. Prot. Ins. Co.*, 48 Penn. St. 374. And see *post*, Ch. on Waiver and Estoppel.

² *Smith v. Saratoga County Mut. Ins. Co.*, 3 Hill (N. Y.), 508.

³ *Fogg v. Middlesex Mut. Ins. Co.*, 10 Cush. (Mass.) 337.

⁴ *Brichta v. New York Lafayette Ins. Co.*, 2 Hall (N. Y. Superior Ct.), 372; *Perry v. Merchants' Ins. Co.*, 25 Ala. 355; *Mellen v. Hamilton Fire Ins. Co.*, 5 Duer (N. Y. Superior Ct.), 101; s. c. 17 N. Y. 609; *Hughes v. Mut. Fire Ins. Co. of Newcastle*, 9 Upper Canada (Q. B.), 387; *Wilson v. Hill*, 3 Met. (Mass.) 66; *Sadler's Co. v. Badcock*, 2 Atk. 554; *Courtney v. New York City Ins. Co.*, 28 Barb. 116; *Carter v. Humboldt Fire Ins. Co.*, 12 Iowa, 284; *Carroll v. Charter Oak Ins. Co.*, 38 Barb. (N. Y.) 402; s. c. 40 Barb. (N. Y.) 292.

⁵ *Goit v. Nat. Prot. Ins. Co.*, 25 Barb. (N. Y.) 189; *West Branch Ins. Co. v. Helfenstein*, 40 Penn. St. 289; *Carroll v. Charter Oak Ins. Co.*, 38 Barb. (N. Y.) 402. *Contra*, *Dey v. Poughkeepsie Mut. Ins. Co.*, 23 Barb. (N. Y.) 623.

the alienee having the policy assigned might have the same ratified and confirmed to him upon application to the directors and with their consent, within thirty days next after the alienation, upon certain terms. After alienation and assignment and loss, but within the thirty days, the assignee presented the assignment for ratification, and offered to comply with the usual terms, and it was held on a bill in equity that the company could not arbitrarily and without cause refuse, and a decree was entered in favor of the assignee for the same amount as the grantor could have recovered if there had been no alienation.¹ We have before seen that where a contract has been made between the applicant for insurance and the agent of the insurers, subject to the approval of his principal, that approval cannot be withheld without reason.² Application to an insurance company for its consent to the assignment of the policy is tantamount to notice, by the applicant, of the acquisition, contemplated or actual, by him of an interest in the property insured, as without that the assignment would be valueless.³

§ 388. **Life Policy — Assignment.** — The reasons which lead to caution as to the assignment of policies in fire insurance⁴ do not exist, at least not to the same extent, in life insurance. There may indeed be cases where they would apply, but they occur so seldom, that generally, almost universally, the claims arising out of life policies are recognized as assignable either absolutely or by way of security, without the assent of the insurers. Even notice is not always required; and, when required, is only necessary to protect the company from the possibility of being obliged to pay both the assignee and the legal representatives. Indeed, in the case of a policy for life, the payment cannot be made to the insured; and in fire, also, the policy runs to the legal representatives and assigns. Much of the usefulness of life insurance depends upon the mobility of policies, and the

¹ 43 Vt. 256.

² *Ante*, § 57. And see also *Illinois Mut. Ins. Co. v. Stanton*, cited *ante*, § 383.

³ *Hooper v. Hudson River Fire Ins. Co.*, 3 Smith (N. Y.), 424.

⁴ *Ante*, §§ 377 *et seq.*

companies have for obvious reasons been desirous to promote that end,—a desire which the courts have been willing to encourage, so far as consistent with legal principles.¹ It has accordingly been held that where the promise is to “the assured, his executors, administrators, and assigns,” to pay the “legal representatives” of the assured, the policy is nevertheless assignable, and that the provision to pay the legal representatives was designed to apply only to a case where the insured died without having previously assigned the policy, and was not to be construed in any sense as limiting the power of the party insured to assign.² So an assignment by a husband to his creditor, out of the proceeds to pay the debt, and the remainder to be paid to the widow, was held to take the whole interest to the assignee for himself and in trust, as against the administrator.³

§ 389. **Life Policy — Requisites of a valid Assignment.** — The requisites to a valid assignment of a life policy have been thus well stated by Shaw, C. J.:⁴ —

“According to the modern decisions, courts of law recognize the assignment of a *chose in action*, so far as to vest an equitable interest in the assignee, and authorize him to bring an action in the name of the assignor, and recover a judgment for his own benefit. But in order to constitute such an assignment, two things must concur: first, the party holding the *chose in action* must, by some significant act, express his intention that the assignee shall have the debt or right in question, and, according to the nature and circumstances of the case, deliver to the assignee, or to some person for his use, the security, if there be one, bond, deed, note, or written agreement, upon which the debt or *chose in action* arises; and, secondly, the transfer shall be of the whole and entire debt or obligation in which the *chose in action* consists, and as far as practicable place the assignee in the condition of the assignor, so as to enable the assignee to recover the full debt due, and to give a good and valid discharge to the party liable.

¹ New York Life Ins. Co. v. Flock, 3 Md. 341.

² Ibid.

³ McCord v. Noyes, 3 Bradford, 139; Harrison v. McCarkey, 2 Md. Ch. 34.

⁴ Palmer v. Merrill, 6 Cush. (Mass.), 282.

“The transfer of a *chose in action* bears an analogy, in some respect, to the transfer of personal property; there can be no actual manual tradition of a *chose in action*, as there must be of personal property, to constitute a lien, but there must be that which is similar, a delivery of the note, certificate, or other document, if there is any, which constitutes the *chose in action*, to the assignee, with full power to exercise every species of dominion over it, and a renunciation of any power over it on the part of the assignor.

“The intention is, as far as the nature of the case will admit, to substitute the assignee in place of the assignor as owner. A man cannot by his own act charge a personal chattel, a carriage and horses, for instance, with a lien in favor of a particular creditor, and yet retain the dominion and possession of them till his death; *a fortiori*, where he retains the memorandum or instrument of transfer of such chattel in his own possession and under his own control. It seems to us equally impracticable to charge a debt due to him, by an order or memorandum retained in his own possession, purporting to give to a particular creditor an equitable lien by the assignment of such *chose in action*, without a transfer or delivery of the security by which it is manifested.”

§ 390. **Conflicting Claims — Creditor and Administrator.** — A case of some novelty occurred recently in Massachusetts, where an insurance company in that State insured the life of a citizen of another, and the insured assigned the policy to a creditor, resident in the first State. After death, the administrator at the domicile of the insured brought suit; but subsequent thereto the assignee of the policy was appointed ancillary administrator at the domicile of the creditor, and brought suit; and it was held that the first suit was no bar to the second, and that the right of the ancillary administrator, representing as he did the equitable interest of the assignee, and the legal capacity to sue, was superior to that of the original administrator.¹ In this case the court say: —

“There was a right of possession in the assignee superior to that of the intestate or his administrator, and which he

¹ Merrill v. New England Mut. Life Ins. Co., 103 Mass. 245.

might pass over to the administrator in Massachusetts upon such terms as he saw fit, consistent with his limited rights. His interest in the policy is not a mere order for a part of the proceeds, but extends to the whole policy alike. With his concurrence the auxiliary administrator may maintain a suit and collect the proceeds of the policy. Without it, neither he nor the principal administrator could control the possession or collect the proceeds. The pledge makes it no longer a question of jurisdiction, as affected by priority of suit, comity between the States, or otherwise, but one merely of the right of the respective parties claiming an interest in the policy. The right of the plaintiff in this suit is superior to that of the principal administrator in Illinois, because he represents the equitable interest and right of immediate possession and control of the pledgee, as well as the legal capacity to sue, which remains in the representatives of the estate of the insured. That legal right to sue is held by the administrators of the insured, wherever appointed, in trust for the benefit of the equitable assignee of the claim. The assignee is entitled to control any suit brought for its recovery. His right would be protected by the courts against any attempt of the administrator to collect or release the demand in disregard of his interests. Upon the same principle, it would be equally protected against prejudice from any attempt to anticipate him by means of a suit instituted by such administrator in his own behalf, and without recognition of the rights of the assignee.

“ Within the same jurisdiction the respective rights of the assignor and assignee may be readily adjusted, and suits controlled. The difficulty arises from the existence of suits in separate and independent jurisdictions. There is a class of decisions, referred to by the defendant, particularly affecting questions of jurisdiction between the federal and State courts, to the effect that a subject-matter once brought within the jurisdiction of a court of general jurisdiction, whether by suit *in personam* or proceeding *in rem*, or even by process of attachment, is in the custody of that court, and cannot be withdrawn or controlled by any process or proceeding of any other court ; but that doctrine is explained and narrowly limited by Mr. Jus-

tice Miller, in *Buck v. Colbath*.¹ It does not apply to this case, for reasons already indicated, because the policy, having been pledged and delivered to another in the lifetime of the intestate, was never in the legal possession of his administrator in Illinois, and therefore was never properly brought within the jurisdiction of the courts in that State, either as assets subject to administration, or as a cause of action which the administrator there could maintain. He could not, by commencing a suit there, transfer to those courts the determination of the rights of the pledgee, so as to compel him to seek them by intervening in such suit. The pledgee has an independent title, accompanied by possession of the policy, and by bill in equity in his own name, or by suit in the name of the administrator in Massachusetts, could enforce his claim. Neither the administrator in Massachusetts nor the administrator in Illinois would be allowed to defeat the prosecution of such a suit."

§ 391. **Life Policy — Assignment by Married Woman — Rights of Children.** — The power of a married woman over a policy on the life of her husband, payable to her, her executors, administrators, or assigns, to her sole use, in case of his death before the wife's, but payable to the children in case of her decease before the husband, the premiums being paid by her, has been frequently before the courts; and in *Eadie v. Slimmon*² it was held that such a policy was unassignable. This was under the law of 1840,³ in which it was provided that if the wife survived her husband, the amount payable should be payable to her for her own use, free from all claims of her husband's representatives or of his creditors, and giving authority also to provide for the children in case of her death. "The act," said the court, "looks to a special provision for a state of widowhood and for orphan children, and it would be a violation of its spirit to hold that a wife could sell or traffic with her policy as though it were real and personal property, or an ordinary security for money." In this case the wife survived the husband. And this case was followed in *Secor v. Dalton*,⁴

¹ 3 Wall. 334.

² 26 N. Y. 9.

³ Of New York.

⁴ Cited in Bliss, *Life Insurance*, 528.

— a case where the wife died before the husband. And in Connecticut, in a case similar to the last, and under a similar statute, the same doctrine was laid down.¹ And in answer to the suggestion that the clause in the policy making it payable to the children was simply the indication of her purpose at that time to give the sum specified in the policy to them in case she deceased before her husband, and that it must be regarded as her expressed but unexecuted intention to give this sum to the children, which intention she could abandon at her pleasure, the court say: "The argument is ingenious, but not sound. The intention was not to give a sum of money to the children, but to make a life policy in a certain event payable to them. The intention was not only expressed but executed. The contract was complete, and the money when due was payable to the children without any further act on her part." By the terms of the policy "it was payable to her only in case she survived her husband; and in case her husband survived her, . . . to the children." Referring to *Eadie v. Slimmon*,² the court say: "The reasoning of the court goes so far as to hold that a policy of this description, prior to the decease of the husband, is absolutely and under all circumstances unassignable by the wife. That such should be the law under a policy, the premiums on which were paid by the husband, certainly seems reasonable and just; while, on the other hand, if the wife paid the premiums out of her separate estate, it is difficult to suggest a reason why she should not have the same power to assign her interest in the policy that she has to assign any other *choses in action* belonging to her. As, however, the death of the wife occurred in the case under consideration before that of the husband, and was the precise event upon which the policy was made payable to the children, no decision was made upon either of those points." And both courts thought the assignee ought to be allowed out of the proceeds the amount of the premiums he had paid; as also in the case of *Chapin v. Fellowes*.³ And in Massachusetts, also, under a substantially similar statute, where the wife effected the insurance and paid the premiums, and died

¹ Conn. Mut. Life Ins. Co. v. Burroughs, 34 Conn. 305.

² *Supra*.

³ 36 Conn. 132.

before her husband, the same conclusion has been reached,¹ and for the same reasons.² In *Moehring v. Mitchell*, just cited, the question was whether the wife could dispose of such a policy by will, and it was held that she could not, even with the consent of her husband. But in *Kerman v. Howard*³ it was held that a husband who effects a policy, payable to his wife or her legal representatives, and pays the premiums and survives his wife, may, after her decease, dispose of the policy by will so as to dispose of the proceeds of the policy among the children of his former wife as against the children of his last wife by a former husband. The report does not show that there was any provision in the policy for the benefit of children in case of survivorship of the husband, but the statute was similar to that of Massachusetts, except in the last clause.⁴ And in the same State a father may assign a policy procured upon his own life, at his own expense, in favor of a minor. Such a case seems not to be within the words of the statute.⁵ In Illinois, though a policy applied for and issued to the wife, payable to her and her assigns, is not assignable, yet as it is under the statute of that State concerning the property of married women her sole and separate property, she may, by an assignment, pledge the whole or any part of the proceeds, and the assignment will be enforced against her in equity.⁶ And in Missouri, if a hus-

¹ *Knickerbocker Life Ins. Co. v. Weitz*, 99 Mass. 157. And see also *Burroughs v. State Mut. Life Ass. Co. of Worcester*, 97 Mass. 359.

² The court cite *Eadie v. Slimmon*, *Com. Mut. Life Ins. Co. v. Burroughs*, *Moehring v. Mitchell*, 1 Barb. (N. Y.) Ch. 264, and *Swan v. Snow*, 11 Allen (Mass.), 224.

³ 23 Wis. 108.

⁴ The statute of Wisconsin is as follows: "Any policy of insurance made by any insurance company on the life of any person expressed to be for the benefit of a married woman, whether the same be effected by such married woman, or by her husband, or by any other person on her behalf, shall enure to her sole and separate use and benefit, and that of her children, if any, independently of her husband and of his creditors and representatives, and also independently of any other person effecting the same in her behalf, his creditors and representatives; and in case of the death of the husband of such married woman, such policy and the benefit thereof shall not go to his executors or administrators, but shall belong to such married woman, and shall be for her sole use and benefit and that of her children." — the part in *Italics* being additional to that of Massachusetts.

⁵ *Clark v. Durand*, 12 Wis. 223.

⁶ *Pomeroy v. Manhattan Life Ins. Co.*, 40 Ill. 398.

band takes out a policy for the benefit of his wife and pays the premium, and both afterwards join in an assignment of the policy to secure a loan, the assignment will be upheld, especially if it also appear that the amount of annual premiums exceeds the sum permitted by the statute, as in that case the policy is not within the statute.¹ In *Baker v. Young*² there was no objection on account of excessive payment of premiums, and the court held that such a policy was assignable under the statute.³ They thought that the clause providing that the policy should inure to the benefit of the wife and children referred simply to the manner of the descent and distribution, to wit, that after the wife has received and reduced the money to possession and dies, it shall go to the children and not to the husband's representatives ; — an interpretation made the more apparent by the concluding paragraph of the section providing for the appointment of a trustee to manage the interests of the married woman in the policy and its proceeds, while nothing is said concerning the interests of the children. The object of the statute was to protect the wife, but not to restrain her, and to leave it open to her choice to make a voluntary disposition of it. The assignment and assent forms a new and derivative contract with the assignee ; but the original contract, nevertheless, remains for the protection of the original insured, and also for the protection of the insurers, and both contracts fail if the first fails, since the last is derived from and dependent on the first.⁴ In Tennessee,⁵ the statute provides that any husband may effect a life insurance on his own life, and the same shall in all cases inure to the benefit of his widow and heirs. But the court held that an ordinary policy, not by its terms made payable to the widow and heirs, was not within the meaning of the statute ; and that, as the insured, who had a policy on his life for seven years, had during its currency, and while he lived the right to dispose of his own as he pleased, an assign-

¹ *Charter Oak Life Ins. Co. v. Brant*, 47 Mo. 419.

² 47 Mo. 453.

³ The statute differs in no material respect from that of Massachusetts.

⁴ *Baker v. Young*, *supra*. See also *Wilson v. Hill* ; *Carpenter v. Prov. Wash. Ins. Co.*, 16 Pet. (U S.) 495.

⁵ *Rison v. Wilkinson*, 3 Sneed, 565.

ment for the security of a creditor was valid. The statute of Tennessee, it is to be observed, provided that the insurance should inure to the benefit of the widow and heirs, and not be subject to the husband's debts, but did not add, as is substantially the case in the statutes of most of the other States, "independently of the claims of the husband or of any other person effecting the policy." And the court intimated that, if the policy had been made payable to the widow and heirs, the proceeds could not have been diverted from that disposition.¹

§ 392. **Life Policy — Devise of Proceeds — Rights of Children.**— So where the policy was for the sole benefit of children, it was held that the father could not devise the proceeds to his executors in trust for other purposes.² The children in such case became vested immediately upon the delivery of the policy with the entire beneficial interest, and it is then beyond the control of the insured. So where the policy is issued to the wife, payable to her, or, in case of her death before her husband, to her children. The husband cannot, after her death, surrender the policy and take out a new one for his own benefit.³ All the above-cited cases proceed upon the ground that when the policy is issued the rights are vested, and cannot be divested without the consent of those to whom they are secured.

§ 393. **Right to sue and Right to appropriate Proceeds not identical.**— The right to sue under these statutes, enacted in the interest of the family support, is not to be confounded with the right to appropriate and use the proceeds. The assignee may well have the right to sue in his own name and recover the amount payable by the policy, but he recovers to hold in trust for the beneficiaries. "The rights of the child," say the court, in *Burroughs v. State Mutual Life Insurance Company*,⁴ "cannot be set up to defeat this action. No trustee has ever

¹ See also *Gould v. Emerson*, 99 Mass. 154.

² *Ruppert v. Union Mut. Ins. Co.*, 7 Robt. (N. Y. Superior Ct.) 155. The charter provided that policies might be issued for the benefit of a minor, and should inure to his benefit independently of the one whose life may be thus insured.

³ *Chapin v. Fellowes*, 36 Conn. 132; *Fraternal Mut. Life Ins. Co. v. Applegate*, 7 Ohio St. 292; *Gould v. Emerson*, 99 Mass. 154.

⁴ 97 Mass. 359.

been appointed to hold and manage the interest of the wife. The policies are in terms payable to the assured and his assigns. The assignment to the plaintiff, assented to by the insurers, transferred to him the legal title in the policies, and the right to sue thereon. If the assured had afterwards died, leaving no wife or child surviving, the assignment would have entitled the assignee to receive the whole amount of the policies to his own use. The plaintiff, having the legal title, may maintain this action at law, and, if he recovers judgment, will hold the proceeds, so far as they inure to the benefit of the child of the assured, in trust for him. The equitable rights of the child under the statute, and the extent to which they may be subject to a claim of the assignee for reimbursement of the sums paid by him for premiums and assessments, or otherwise, cannot now be determined, but may be ascertained upon a bill of interpleader filed by the insurance company, or in a suit by the child against this plaintiff after he shall have recovered judgment in this action.”¹

§ 394. If a husband insures his life for the benefit of his wife, without her authority, the policy being made payable to her, her subsequent acceptance of the policy is such a ratification of the act of her husband as to bring her within the statute which authorizes a wife to cause her husband's life to be insured, and to constitute a valid contract between her and the insurance company.²

§ 395. **Assignment — What constitutes — Possession — Delivery.** — Possession of the policy is only *prima facie* evidence of a right to claim the proceeds, and is open to the objection that there is an assignment outstanding in the hands of another,³ or to any other evidence explanatory of the possession and showing its purpose.

Mere possession, however, is evidence of title in the policy and the right to its proceeds. In the absence of a formal transfer in writing, which is not necessary, there are many

¹ The general subject of the right to sue, and who may claim the loss, will be considered hereafter, when we come to treat of the loss and its incidents.

² *Thompson v. Am. Fire, Life, and Sav. Ins. Co.*, 46 N. Y. 675.

³ *Wood v. Phoenix Mut. Life Ins. Co. of Hartford*, 22 La. An. 617.

other facts and circumstances which courts will recognize as equivalent to an assignment. Delivery is not essential.

While delivery of the instrument of assignment seems to be necessary as against the assignee in bankruptcy,¹ or at least a delivery and deposit of the policy before the bankruptcy, for that purpose, with notice to the company, which may be after the fiat,² it does not seem to be necessary in a case where a person insures his life and assigns his policy, and the assignee gives notice to the insurers and subsequently pays all the premiums. In one case, though the assignee had never received the policy, it was held he was entitled to it, even against one who had innocently advanced money to the assignor after the assignment.³ So a letter written by the insured, giving notice of a wish to transfer his interest to a third person, the letter being shown to the company and its contents noted on their books, was held to be a good assignment in equity against a subsequent assignee who had got possession of the policies.⁴ Reputed ownership, and the fact that the policy is left within "the order and disposition" of the bankrupt, seem to require something more to perfect an assignment of a policy as against an assignee in bankruptcy than as against an ordinary assignee. But a mere direction from the solicitor of the assignee, though entered by the company on its books, to send letters touching the policy to that solicitor, is no notice to take the policy out of the order and disposition of the bankrupt as against his assignee.⁵ Yet where it was provided that if the policy should be assigned *bona fide*, the assignee should have the benefit of it so far as his interest extended, although the insured should commit suicide, it was held that a deposit of the policy as security for a debt, accompanied by a letter promising to assign it upon request, though there was no notice to the insurers, was a *bona fide* assignment within the meaning of the policy.⁶ Indeed, in such case, a mere deposit gives the depository a

¹ *Palmer v. Merrill*, 6 Cush. (Mass.) 282.

² *In re Styam*, 1 Phillips' Ch. 105.

³ *Neale v. Molineux*, 2 C. & K. 672.

⁴ *Chowne et al. v. Baylis*, 31 Beav. 351.

⁵ *West v. Reid*, 2 Hare, Ch. 261.

⁶ *Cook v. Black*, 1 Hare, Ch. 390.

"*bona fide* interest" in the policy "as a security for money."¹ So a deposit with a letter authorizing the depositary to hold as security for any indebtedness that may exist between the insured and the assignee, is an "assignment" which a court of equity will recognize and enforce.² So if the policy if "legally assigned" is to be good to the assignee, a deposit as security for any balance of account which may be found due as between the assured and the assignee is good. As in strictness a policy cannot be legally assigned, the words here must be taken in the popular sense as equivalent to "lawfully," that is, effectually and properly assigned, so that the courts can recognize and enforce the act.³

§ 396. **Notice of Assignment — Life.** — Notice of the assignment is not necessary to its validity as between the assignees and the insurers unless required. In this respect assignments of life policies bear a more near analogy to marine than to fire policies. When the contract is to pay to personal representatives or assigns, the right of the assignee becomes perfect by force of the assignment alone, and by the transfer he becomes instantly invested with the legal interest in the policy, of which by the same act the assignor becomes divested. The insurer does not need notice for his protection. He cannot be required to pay unless the policy is produced, or its non-production satisfactorily accounted for; nor can he be required to pay without proof that the person demanding payment is by law the rightful assignee of the policy, and entitled to recover the money. He is sufficiently protected against all risks, except such as may arise from his own carelessness, against which the law gives him no protection.⁴ But for his own protection, where it is not required, it may be prudent for the assignee to give notice, in order to avoid the claims of subsequent assignees, as also claims for set-off for advances to the assignor before notice. When notice is required, notice after death is sufficient, and probably at any time before payment to the repre-

¹ Moore v. Woolsey, 4 E. & B. 243.

² Jones v. Consolidated Ins. Co., 26 Beav. 256.

³ Dufaur v. Prov. Life Ass. Co., 25 Beav. 603.

⁴ Mut. Prot. Ins. Co. v. Hamilton, 5 Sneed (Tenn.), 269.

sentatives of the assignee.¹ Still, in many cases, notice of the assignment is required, and the assent of the company thereto, as a guard against the dangers of speculative, not to say gambling, insurance. When these are required, of course, the assignment is ineffectual without them. And so it was held in *Stevens v. Warren*,² which was a case where the assured in his lifetime assigned his policy to one who had no insurable interest in the life of the assured, without the assent of the insurers, which by the terms of the policy was requisite. It is easy to see that unless this check were provided a dangerous species of gambling and speculation might be encouraged. Verbal notice will be sufficient, unless it be required to be in writing,³ and to an agent,⁴ unless he be a trustee, or in some way interested.⁵ No form of words is necessary. Any expression in words appropriate to convey the fact, and used for that purpose, will amount to notice. It is enough for the assignee to say that he is the holder.⁶ But the words should be used under such circumstances as to naturally call the attention of the insurers to the fact that notice is intended. A mere incidental mention, therefore, to a clerk, by the agent of the holder, who had been sent to inquire if the premiums had been paid, might not be enough;⁷ and information acquired in casual conversation, such as would not be ordinarily treated as having any special purpose, would not be notice,⁸ at least as against the claim of a subsequent assignee.⁹

§ 397. **Assignment — Fraud.** — If the assignment be procured by undue influence, which amounts to moral duress, as by exciting the fears of a wife by threats that her husband shall be incarcerated if she does not make the assignment,¹⁰ of course it is void, as is also the case if it be procured by fraud;¹¹ as

¹ *New York Life Ins. Co. v. Flack*, 3 Md. 341.

² 101 Mass. 565.

³ *North Brit. Ins. Co. v. Hallett*, 7 Jur. N. S. 1263; *Gale v. Lewis*, 9 Q. B. 742.

⁴ *Ibid.*

⁵ *Browne v. Savage*, 4 Drew. 635.

⁶ *Ex parte Steight*, 2 Dea. & Chit. 314.

⁷ *Edwards v. Scott*, 2 Scott (N. H.), 266.

⁸ *Edwards v. Martin*, 1 L. R. Eq. 121.

⁹ *North Brit. Ins. Co. v. Hallett*, 7 Jur. N. S. 1263.

¹⁰ *Eadie v. Slimmon*, 26 N. Y. 9.

¹¹ *Ante*, § 385.

where, upon private information of the dangerous sickness of the insured, the policy is purchased of the assignee of the insured at what it would be worth if there was no such sickness, the assignee being in ignorance of the fact;¹ and so where possession is obtained of a policy payable to one third person, by false pretences on the part of the person who effected the insurance, which upon his request is cancelled, and thereupon another policy is issued payable to a different person from the payee in the cancelled policy.² This case was a bill in equity by the payee of the first policy against the company and the payee of the second policy (who, however, did not appear, though notified of the suit), to compel the payment of the proceeds of the second to her.

§ 398. **Assignment of Life Policy to a Party without Interest void.** — All the objections that exist against issuing a policy to one upon the life of another, in whose life the former has no insurable interest, exist against his holding such policy by mere purchase and assignment from another. In either case the holder of such policy is interested in the death, rather than in the life, of the insured. The policy of the law forbids such speculations based on the continuance of human life. It will not uphold a practice which incites danger to life, and it substantially declares that no one shall have any claim under a policy upon the life of another, in whose life he had no insurable interest at the time he acquired the policy, whether the policy be issued to him directly from the insurer, or whether he acquires the policy by purchase and assignment from another. If he may purchase a policy on the life of another, in whose life he has no interest, as a mere speculation, the door is open to the same practice of gambling, and the same temptation is held out to the purchaser of the policy to bring about the event insured against as if the policy had been issued directly. It is, in fact, an attempt to do indirectly what the law will not permit to be done directly.³ In this case, the insured

¹ Jones et al. v. Keene, 2 Mood. & Rob. 348, and note.

² Lemon v. Phoenix Mut. Life Ins. Co., 38 Conn. 294. And see *ante*, § 385.

³ Franklin Life Ins. Co. v. Hazzard, Sup. Ct. Ind., 2 Ins. L. J. 180, citing and approving Stevens v. Warren, 101 Mass. 564, and doubting St. John v. Am. Mut.

sold his policy to one who was not his creditor, and who had no insurable interest, and the company assented to the sale and assignment.

§ 399. *Assignment of Part without Assent invalid.* — So also an assignment of part of the proceeds of a policy, as, for instance, by the insured, a debtor, to secure his creditor, carries with it no obligation on the part of the insurer to pay the assignee that part unless the insurer expressly assent, — upon the familiar principle that a debtor cannot be presumed to consent that what he has agreed to pay *in solido* and at once to one person, he may be obliged to pay in parts to different individuals. He will not be presumed to give several parties several rights of action against him when only one right existed, unless he plainly assent thereto. Mere notice will not do. And at law the creditor cannot recover in an action against the administrator of the insured.¹ In a cause in equity, however, in Illinois, where the policy was payable to the wife, and she had assigned a part of it to secure a debt of her husband, and after his death refused to recognize the assignment, and claimed the whole amount, — on a bill of interpleader, filed by the insurers, it was held that the assignment must be enforced in favor of the creditor, and the balance of the proceeds paid to the widow.²

Life Ins. Co., 13 N. Y. 31; Valton v. Nat. Loan Fund Life Ass. Co., 20 N. Y. 32; and Ashley v. Ashley, 3 Sim. 149, apparently to the contrary.

¹ Palmer v. Merrill, 6 Cush. (Mass.) 282.

² Pomeroy v. Manhattan Life Ins. Co., 40 Ill. 393.

CHAPTER XVIII.

OF THE RISK, ITS DURATION AND EXTENT.

§ 400. *Duration of the Risk — When it commences — “Time of Insurance.”* — As a general rule, the policy, if delivered, takes effect from its date, unless it be otherwise stated, as that it shall not be valid till the premium be paid, or some other condition be complied with, and then upon the payment of the premium or compliance with the required condition, or a waiver of either, it covers the subject-matter of insurance from the date of the policy, unless there is evidence of a contrary intent.¹ If the premium be paid, and the policy be not delivered till afterwards, the policy takes effect by relation as of its date, even though a loss intervenes.² If it be delivered, but upon the express stipulation that it is to take effect on a certain day, that stipulation will control;³ or, upon the express understanding that it is not to take effect till another policy has been surrendered, it will not relate back so as to cover a loss which occurs prior to the required surrender.⁴

In *Isaacs v. Royal Insurance Company*,⁵ it was queried whether a policy from a certain day to a certain other day would cover a loss on the first-mentioned day; but in Massachusetts it has been held, that a lease from the “first day of July” takes effect on the second day of July.⁶ “From the day of the date,” and “from the date,” were formerly held to

¹ *Ruse v. Mut. Ben. Life Ins. Co.*, 23 N. Y. 516; *Whitaker v. Farmers' Union Ins. Co.*, 29 Barb. (N. Y.) 312; *Hallock v. Com. Ins. Co.*, 2 Dutch. (N. J.) 268; s. c. affirmed, 3 ib. 645; *ante*, §§ 57, 58, 64, 65.

² *Lightbody v. N. A. Ins. Co.*, 23 Wend. (N. Y.) 18; *City of Davenport v. Peoria Mar. and Fire Ins. Co.*, 17 Iowa, 276. 1078331

³ *American Home Ins. Co. v. Patterson*, 28 Ind. 17; *Western v. Genessee Mut. Ins. Co.*, 2 Ker. (N. Y.) 258.

⁴ *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328.

⁵ 39 L. J. Exch. 189.

⁶ *Atkins v. Sleeper*, 7 Allen (Mass.), 487.

be distinguished in that, in the computation of time, it was reckoned from the day in the former case, and excludes it, while in the latter it was reckoned from the act or thing done, and includes the day on which it is done.¹ But it has since been held in England that the two phrases mean the same thing, and that the rule of inclusion or exclusion applies according to the intent of the parties, to be derived from the context. In this country, however, there is, in some courts, an inclination to adhere to the distinction.² It is impossible, however, to reconcile the decisions either with the rule of inclusion or exclusion. The circumstances and intent of the parties are to control; and such construction should be given as will operate most to the ease of the party entitled to favor, and by which rights will be secured and forfeitures avoided.³ And where the policy was in fact a reinsurance, and was for a year, but specifying no time when the year was to begin, it was held that it began from the date of the prior policy, though that was some months prior to the issue of the latter policy.⁴

The time of insurance, within the meaning of a policy which provides that it is not to take effect if the subject of insurance is deceased "at the time of insurance," is not necessarily identical with the date of the policy. By its special terms the policy may provide that the insurance shall run from a certain day prior to its date, to a certain day subsequent thereto, and if the death of the subject-matter of insurance intervene between the first date and the date of the policy, it will be a loss covered by the policy. When the policy itself covers a period antecedent to its date, and does not specify the contingency upon which it shall take effect, the date of the policy, or of its actual delivery, becomes of little or no importance in determining when the insurance takes effect.⁵

¹ Sir R. Howard's Case, 2 Salk. 625.

² *Atkins v. Sleeper*, 7 Allen (Mass.), 487; *Blake v. Crowninshield*, 9 N. H. 304; *Cornell v. Moulton*, 3 Denio (N. Y.), 12; *Weeks v. Hall*, 19 Conn. 376.

³ *O'Connor v. Towne*, 1 Texas, 107.

⁴ *Phila. Life Ins. Co. v. Am. Life Ins. Co.*, 23 Penn. St. 65.

⁵ *American Horse Ins. Co. v. Patterson*, 28 Ind. 17; *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96.

§ 401. *Duration of the Risk — When it terminates.* — Insurance from a given day until a certain other given day, and for so long after as the insured shall pay the premium paid on the first day, extends to and includes the latter day, it being the evident intention that the policy is to be renewed, as any other construction would leave the insured without protection on each day of renewal.¹ A comparatively recent case in Massachusetts presented a question of some complication as to the time covered by the policy. The policy was dated Oct. 5, 1866, and contained the following clauses: "This policy of insurance is for the period of twelve months, commencing at twelve o'clock (noon) on the fifth day of October, 1866, and terminating at twelve o'clock (noon) on the fifth day of October, 1867," "against loss of life . . . to be paid within ninety days after sufficient proof that the assured at any time after the date hereof, and before the expiration of this policy, shall have sustained personal injury caused by any accident within the meaning of this policy, . . . and such injuries shall occasion death within ninety days from the happening thereof." On the eleventh day of December, 1866, at nine o'clock in the forenoon, the insured met with an accident in consequence of which he died on the 12th of March, 1867, about nine o'clock in the forenoon. Upon these facts the court (Chapman, C. J.) says: —

"No computation of time will bring the death within ninety days from the happening of the accident. But the rule of computation is stated in *Atkins v. Sleeper*.² When time is computed from an act done, the general rule is to include the day. When it is computed from the day of the act done, the day is excluded. The language of the instrument requires that the computation be made from the time of the act done, namely, the accident.

"But it is contended that as this is an insurance for twelve months, the provision by which it is attempted to exempt the

¹ *Isaacs et al. v. Royal Ins. Co.*, 22 L. T. 681. The court take pains to say, in this case, that they do not wish to give any opinion as to whether the first day is also included.

² 7 Allen (Mass.), 487.

company from liability for the death of the insured, happening from a cause within the meaning of the policy, during said term, is inconsistent with the general object and tenor of the policy, and is void. No such inconsistency is apparent to the court. On the contrary, the policy clearly describes the cases in which the loss of life shall make the company responsible, and limits the liability to such cases. It is further contended that if the provision in the policy that the injuries shall occasion death within ninety days can have any legal force or effect, it must be construed to mean such injuries as shall occasion death within ninety days after the termination of the twelvemonth. But as the ninety days are expressed to be from the happening of the accident, this construction cannot be accepted. It is said that unless the clause be void, or be construed as above stated, an effectual life insurance for more than ninety days was impossible. If this were so, it would be the result of the terms of the contract upon which the action is brought. But here is simply an insurance against certain accidents which may happen within a given time, and result fatally within a given time after they happen.”¹

§ 402. Risk — What it includes — Fire. — Unless there be in the policy specific limitations, the risk extends to all losses by fire, death, or accident, or whatever cause of loss or injury be insured against, however they may be occasioned. Of the force and effect of some of the exceptions and limitations we have already treated.² It has often been said that loss by fire means by actual ignition, and for this the early case of *Austin v. Drewe*³ is cited as an authority, which simply decides that an insurance company is not liable, on a policy insuring against all damage by fire to the stock and utensils of a sugar-house, for damage done to the sugar by the heat of the usual fires employed for refining, the fires being unusually intense by reason of negligence in their management. And it has been suggested that the true ground of the decision was, that insurers do not undertake to be responsible for the excessive use of fire purposely used, whereby the article to which the fire is

¹ *Perry v. Prov. Ins. and Inv. Co.*, 99 Mass. 162.

² *Ante*, c. 9.

³ 6 Taunt. 436.

purposely applied is damaged, whether by heat or ignition ; and that they would be no more liable in this case than they would where bread is overbaked or coffee is overroasted. At all events, if the case of *Austin v. Drewe* decides any thing more than is above suggested, it has been denied to be good law, by very high authority.¹ And it can scarcely be doubted that in certain cases injury done to a building and its contents by heat, as by scorching paint, cracking glass, and blistering pictures and furniture, or heating and thus destroying many articles of commerce, without actual ignition or visible burning, is within the risk ; though it is no doubt true that where a chemist, artisan, or manufacturer employs fire in the processes of art and manufacture, and the article which is thus purposely subjected to the action of fire is damaged in the process,— the fire not passing its ordinary limits,— such damage is not within the loss covered by the policy.² In *Sobier v. Norwich Fire Insurance Company*,³ which was a case where the fire, originating, from without a theatre, heated its walls to such a degree as to cause it to take fire within, the insurers were held liable. The policy, however, provided that they should be exempt from loss for fire originating in the theatre, and the real question was whether the fire in this case originated in the theatre ; and it was held that it did not. In *Brown v. King's County Fire Insurance Company*,⁴ a druggist was warming upon his stove an inflammable ointment, as he was wont to do, which took fire and communicated with the building ; and it was held that this was a loss covered by the policy.

§ 403. Risk — “ Usurped Power ” — “ Civil Commotion ” — “ Mobs or Riots.” — Destruction by fire set by an ordinary mob

¹ Cushing, J., in *Scripture v. Lowell*, 10 Cush. (Mass.) 356. After a very able criticism of the case of *Austin v. Drewe*, Cushing, J., adds : “ It has been thought proper thus to analyze the case of *Austin v. Drewe*, because, having been variously reported by four different reporters, and presenting itself prominently in several of the text-books, but in nearly all of them with more or less of misconception, it has become the starting-point, in legal construction, of conflicting lines of argument, leading to sundry false conclusions, and among others, that of a supposed application to the present case.” See also note of Judge Bennett, appended to the case in the first volume of his “ *Fire Insurance Cases*,” p. 104. Trumbull, J., *Case v. Hartford Ins. Co.*, 13 Ill. 676.

² *Ibid.* ; *Beaumont, Ins.* 37.

³ 11 Allen (Mass.), 336.

⁴ 31 How. (N. Y.) 508.

is not destruction by "usurped power." "Usurped power" would seem to mean that of an armed invasion or rebellion, when armies are on foot in their support. And perhaps there is a distinction between an ordinary mob, or bread riot, and a rebellious mob, or one having political purposes. The one would be treasonable, and might be properly said to usurp power, while the other would be only criminal.¹ Nor is a destruction of the property by order of the municipal authorities to stay a conflagration a destruction caused by "usurped power," even though it be done illegally. It is only a destruction by those usurping the power of government, that is excluded by such a provision.² "Usurped power" is "rebellion conducted by authority," "got to such a head as to be under some authority."³ And fire occasioned by the burning of a bridge, lawfully ordered by the military authorities, to prevent the advance of a hostile armed force, regularly organized, is not a loss "occasioned by mobs or riots."⁴ In *Barton v. Home Insurance Company*,⁵ during the late rebellion, the national soldiers were overpowered and compelled to surrender to an armed and organized force of rebels, by whom the property was burned; but there was no evidence that the destruction was authorized by an order from the commanding officers. After referring to the English cases, and to the fact that the case at bar was one of novel impression in this country, the court, in giving judgment for the defendant, proceeds:—

"It would be doing violence to the language which the parties have seen fit to use, and would be also a strained and unnatural interpretation of their meaning, to say that the insurer would be liable in all cases, except when he could show that the burning took place by order of the officer immediately commanding the rebellious forces. The language of the proviso is, that the company shall not be liable for any loss or damage by fire which may happen by means of invasion,

¹ Wilmot, C. J., in *Drinkwater v. Lon. Ass. Co.*, 2 Wilson, 363.

² *City Fire Ins. Co. v. Corliss*, 21 Wend. 367; *Pentz v. Ætna Ins. Co.*, 9 Paige, Ch. (N. Y.) 568.

³ Per Lord Mansfield, *Langdale v. Mason*, 2 Marsh. Ins. 792.

⁴ *Harris v. York Mut. Ins. Co.*, 50 Penn. St. 341.

⁵ 42 Mo. 156.

military or usurped power, &c. If the military or usurped power, or the invasion, was the means that occasioned, or the proximate cause of, the loss, then the company cannot be held liable within the terms of the contract. An army of invasion, or engaged in rebellion, is liable to commit acts of spoliation or burning without any direct commands from the superior officers, and the insurer certainly never intended to incur a risk by reason of such acts. To exonerate the defendant from its liability, it is not material how, or in what way, the fire originated, provided it was within the range of any one or more of the excepted causes. The real question is, did the fire happen or the loss occur by reason of, or in consequence of, the military and usurped power of the rebels? . . . and were they the proximate cause of the burning and destruction of the property?"

But the anti-Roman Catholic riots of London in 1780, which grew out of hostility to the laws granting certain privileges to the Catholics, and were long-continued and violent and tumultuous, amounted to a "civil commotion" within the meaning of a policy exempting the insurers from loss in case of "civil commotion." This "is not an occasional riot," said Lord Mansfield to the jury in that case; "that would be another question. I do not give any opinion what that might be. . . . I think a civil commotion is this,—an insurrection of the people for general purposes, though it may not amount to a rebellion where there is a usurped power."¹ If the insurer be liable for loss occasioned by a riot, the fact of the riot need not first be established by a criminal prosecution, nor is it material that the riotous assemblage was originally gathered for a lawful purpose.² In this case there seems to have been an affray, succeeded by a riot; that is, said the court, "a tumultuous disturbance of the peace by three persons or more," and the fact that it was preceded by an affray did not make it the less a riot. In *Spruil v. North Carolina Mutual Life Insurance Company*,³ a runaway slave, whose

¹ *Langdale v. Mason*, 2 Marsh. Ins. 792.

² *Dupin v. Mut. Ins. Co.*, 5 La. An. 482.

³ 1 Jones (N. C.), 126.

life was insured, was shot while resisting the lawfully appointed patrol who were pursuing him, and upon the question whether his death was "by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped authority, or by the hands of justice," the court defined an insurrection to be "a seditious rising against the government; a rebellion; a revolt;" and a riot to be "where three or more persons actually do an unlawful act, either with or without a common cause . . . the intention with which the parties assemble, or at least act, being unlawful," in the latter respect differing from the judgment of the Supreme Court of Louisiana, as stated above. In the same case a commotion was said to be "a tumult; and a tumult to be a promiscuous commotion in a multitude; an irregular violence, a wild commotion. A civil commotion, therefore, requires the wild or irregular action of many persons assembled together." And to die by the hands of justice was said to be "to die by some general sentence for the commission of some felony." As the slave met his death in resistance to lawful authority, the loss was held not to be within any of the exceptions.

§ 404. Risk—Injury by Water and Removal—Theft.—Damage resulting from *bona fide* efforts to save the property from the fire, as by water, and breakage by removal, and by loss or theft consequent upon exposure occasioned by the fire, are within the loss covered by a policy against damage by fire.¹ The theft must be one of the consequences of the fire or removal, and if so, the time of the theft, whether at the time of the fire or afterwards, is immaterial.² But if loss by theft be expressly excluded, there can be no recovery, even though by the terms of the policy the company is not to be liable at all for loss unless the insured "use all due diligence in removal

¹ *Whitehurst v. Fayetteville Mut. Ins. Co.*, 6 Jones (N. C.), 352; *Stanley v. Western Ins. Co.*, 3 L. R. (Exch.) 71; *Thompson v. Montreal Ins. Co.*, 6 Upper Canada (Q. B.), 319; *Lewis v. Springfield Fire and Mar. Ins. Co.*, 10 Gray (Mass.), 159; *Tilton v. Hamilton Fire Ins. Co.*, 1 Bosw. (Superior Ct. N. Y.) 367; *Independent Mut. Ins. Co. v. Agnew*, 34 Penn. St. 96; *Witherell v. Maine Ins. Co.*, 49 Me. 200; *Talamon v. Home Ins. Co.*, 16 La. An. 426.

² *New. and Lon. and Liv. Fire and Life Ins. Co.*, 30 Mo. 160.

and preservation of the property.”¹ And the removal should be fairly and reasonably necessary, and not as the result of an unreasonable and unfounded apprehension, as when fire is at a considerable distance. And in one case it has been held that damages from removal, where there was a reasonable apprehension of danger, and where the fire was already burning the fourth building distant in the same block, was not recoverable.² But the better doctrine no doubt is, that whether the removal be necessary or not depends upon the circumstances of each case; and that if the removal be under such circumstances that had it not taken place the insured would have been guilty of negligence, he may recover, while he cannot recover if the goods are wantonly or unnecessarily removed, or perhaps if prudence did not require them to be removed.³

§ 405. **Risk — Smoking — Illegal Practices.** — If smoking be prohibited, or declared to be not allowed, a prohibition by the insured, with abstinence on his own part, and reasonable and proper precautions against it on the part of others, is a compliance with the requirement.⁴ And the policy covers goods illegally kept for sale; the insurance not being upon the business or mode of sale, but upon the property itself.⁵

§ 406. **Risk — Lightning.** — Loss by ignition resulting from lightning is covered by a policy insuring against danger by fire, or by fire from lightning. But loss, by being torn to pieces by lightning, without combustion, is not.⁶ Insurance against loss by fire resulting from lightning is one thing, and insurance against loss by lightning is quite another;⁷ and a

¹ *Fernandez v. Merchants' Mut. Ins. Co.*, 17 La. An. 131; *Webb v. Prot. Ins. Co.*, 14 Mo. 3.

² *Hillier v. Alleghany County Ins. Co.*, 3 Penn. St. 407.

³ *Case v. Hartford Ins. Co.*, 13 Ill. 676; *Brady v. N. W. Ins. Co.*, 11 Mich. 425.

⁴ *Ins. Co. of North America v. McDowell*, 52 Ill. 121; *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 222.

⁵ *Niagara Fire Ins. Co. v. De Graff*, 12 Mich. 124. And see *ante*, § 246.

⁶ *Babcock v. Montgomery County Mut. Ins. Co.*, 6 Barb. (N. Y.) 637; s. c. affirmed, 4 Comst. (N. Y.) 326; *Kenniston v. Merrimack County Mut. Ins. Co.*, 14 N. H. 341.

⁷ *Ibid.*

company authorized to insure against the former is not thereby authorized to insure against the latter.¹

§ 407. **Risk — Misconduct — Fraud — Wilful Destruction of Property insured — Suicide.** — Loss by *misconduct* is not covered by the policy, as where one sets fire to a steamboat by throwing on combustibles, brought to an improper place in contravention of law, and for the purpose of getting up a great head of steam while the steamboat is racing with another boat.² Nor is loss by fraud, wilful burning, voluntary suicide, or other wilful destruction of the subject-matter of insurance, whereby the event insured against is brought about.

§ 408. **Risk — Negligence.** — Mere carelessness and negligence, however great in degree, of the insured, or his tenants or servants, not amounting to fraud, though the direct cause of the fire, are covered by the policy. Indeed one of the principal objects of insurance against fire is to guard against the negligence of servants and others ; and, therefore, while it may be said generally that no one can recover compensation for an injury which is the result of his own negligence or want of care, the contract of insurance is excepted out of the general rule. Nor does it make any difference whether the negligence is that of the insured himself or of others. The law looks only at the proximate cause of the loss.³ But negligence in a matter as to which the insurers expressly stipulate that they will not assume the risk, as where ashes are placed by a boy in wooden vessels, the insurers stipulating that they will not assume the

¹ *Andrews v. Union Mut. Ins. Co.*, 37 Me. 256.

² *Citizens' Ins. Co. v. Marsh*, 5 Penn. St. 387. See *post*, § 411, for distinction between misconduct and negligence.

³ *Cumberland Valley Mut. Prot. Co.*, 58 Penn. St. 419 ; *Shaw v. Robberds et al.*, 6 Ad. & El. 75 ; *Catlin v. Springfield Fire Ins. Co.*, 1 Sumner (U. S. C. Ct.), 434 ; *Sanford v. Mechanics' Mut. Fire Ins. Co.*, 12 Cush. (Mass.) 541 ; *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416 ; *Mickey v. Burlington Ins. Co.*, Sup. Ct. Iowa, 2 Ins. L. J. 15 ; *Austin v. Drewe*, 6 Taunt. 436 ; s. c. 4 Campbell (N. P.), 561 ; *Maryland Fire Ins. Co. v. Whitford*, 2 Law Transcript, 284 (1869) ; *Columbian Ins. Co. v. Lawrence*, 10 Pet. (U. S.) 507 ; *Gates v. Madison County Mut. Ins. Co.*, 1 Seld. (N. Y.) 469 ; *Williams v. New England Mut. Fire Ins. Co.*, 31 Me. 219 ; *Johnson v. Berkshire Mut. Fire Ins. Co.*, 4 Allen (Mass.), 388 ; *St. Louis Ins. Co. v. Glasgow*, 8 Mo. 713 ; *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. (U. S.) 213.

risk if ashes are allowed to remain in wood, although the fact was unknown to the insured, and was done without orders and contrary to the usual practice, will work a forfeiture.¹ Whether the fire is the result of negligence is of course a question of fact for the jury, if the facts from which it is to be inferred are in dispute, and is so much a question of circumstances that so trifling a fact as dry weather, and the direction and strength of the wind, are to be taken into account in determining whether a fire, occurring by the dropping of coals upon the track, and thence communicating through the dry grass to the plaintiff's farm and land, is due to the negligence of a railway company.² And if the policy requires the insured, upon the occurrence of a fire, to use all reasonable means for the "protection" of the property, this means that he shall take the requisite steps to prevent its further deterioration ; but it does not require him to repair or restore to the original condition.³

§ 409. **Risk — Negligence — "Wilful Exposure."** — Where an accident policy forbids "wilful exposure," negligence is no defence.⁴ So where the policy provides liability for "wilful and wanton exposure."⁵ But in *Morel v. Mississippi Valley Life Insurance Company*,⁶ where the policy said nothing about negligence, it was held that the insured having "inadvertently" put his elbow out of the window of a railway carriage, whereby he contributed to the accident, could not recover, — a decision which is not only unsupported by the citation of any authority, but is counter to the almost universal current of the authorities.⁷ And no case in life insurance has been found where negligence of usual precautions in the preservation of health, or even the utmost carelessness and recklessness relative

¹ *City of Worcester v. Worcester Mut. Fire Ins. Co.*, 9 Gray (Mass.), 97.

² *Webb v. R. W. & O. R. R. Co.*, New York Ct. of App., Jan. 1873, Alb. L. J., Feb. 22, 1873.

³ *Hoffman v. Aetna Fire Ins. Co.*, 1 Robt. (Superior Ct. N. Y.) 501 ; s. c. affirmed, 32 N. Y. 405.

⁴ *Prov. Life Ins. and Inv. Co. v. Martin*, 32 Md. 310.

⁵ *Schneider v. Prov. Life Ins. Co.*, 24 Wis. 28.

⁶ 4 Bush (Ky.), 535.

⁷ And see *post*, chapter on Accident Insurance.

thereto, have been made a ground of defence. Yet no doubt many cases of death have occurred attributable to such negligence as the cause.¹

§ 410. **Risk — Gross Negligence — Design.** — Gross negligence of workmen in making repairs, it was said, in *Jolly v. Baltimore Equitable Society*,² will avoid the policy. But there was nothing in the case that required any decision upon that point, and it is not probable that any thing short of such negligence as raises a presumption of bad faith, amounting to fraud or design, was intended. This, by all the authorities, avoids a policy, as no man can be allowed in a court of justice to profit by his own wrong, or to avail himself of his own turpitude as a ground of recovery in a suit.³ But losses by “gross negligence” and “design” are sometimes expressly excepted as grounds of liability. The first term, as used in a condition exempting from loss on that account, it has been said, “is the want of that diligence which even careless men (*dissoluti homines*) are wont to exercise.”⁴ “For he who is only less diligent than very careful men cannot be said to be more than slightly inattentive; he who omits ordinary care is a little more negligent than men ordinarily are; and he who omits even slight diligence, fails in the lowest degree of prudence, and is grossly negligent.”⁵ Loss by mere negligence is not loss “by design,” which imports plan, scheme, and intention.⁶

§ 411. **Risk — Negligence amounting to Misconduct.** — But negligence which amounts to misconduct is not insured against. Misconduct is defined to be a transgression of some established and definite rule of action, where no discretion is left except what necessity may demand, as contradistinguished from neg-

¹ As to what would be the rule where there are several apparent causes, of which negligence may be one, see *ante*, § 301.

² 1 Harr. & Gill, 295.

³ *Henderson v. Western Mar. and Fire Ins. Co.*, 10 Rob. (La.) 164; *Huckins v. Peoples' Mut. Ins. Co.*, 11 Fost. (N. H.) 238; *Robinson v. Mercer County Mut. Fire Ins. Co.*, 3 Dutch. (N. J.) 134; *Western Farmers' Ins. Co. v. Miller*, 1 Handy (Cincinnati Superior Ct.), 325. And see also authorities cited in the preceding section.

⁴ Hein. El. Jur. lib. 3, tit. 14, § 787.

⁵ *Campbell v. Monmouth Mut. Fire Ins. Co.*, 59 Me. 430.

⁶ *Catlin v. Springfield Fire Ins. Co.*, 1 Sumner (U. S. C. Ct.), 424.

ligence, carelessness, and unskilfulness, which are transgressions of some established but indefinite rule of action, where some discretion is necessarily left to the actor. Misconduct is a violation of definite law; carelessness, an abuse of discretion under an indefinite law. Misconduct is a forbidden act; carelessness, a forbidden quality of an act, and is necessarily indefinite.¹ Thus where the captain of a steamer, in running a race with another steamer, and for the purpose of making more steam, brings from the hold of the vessel a barrel of turpentine, knocks the head out, and places it so near the furnace that the fire is communicated to the wood upon which the turpentine is thrown, and thence to the barrel, such manner of use of turpentine being in contravention of an act of Congress, as matter of law, this is misconduct, and avoids the policy. In *Chandler v. Worcester Insurance Company*,² Shaw, C. J., puts the case of a party insured standing by the fire, which was yet so trifling that by throwing on a cup of water, which was at hand, the fire might be extinguished, as a case of misconduct which would avoid a policy. The difference between this and designed destruction, by actually setting fire, is certainly hardly appreciable as affecting the intent of the insured, though ostensibly in one case there is a positive act, while in the other there is no action at all.

§ 412. Risk — Fire occasioned by falling of Walls — Proximate Cause. — Where a fire had happened, and the day after it was extinguished the walls of the burnt edifice, in consequence of being weakened by the fire, fell upon another building, crushing it in, the latter injury was held to be covered by a policy against damage by fire. The fire is in such case the proximate cause, though not the actual instrument of the destruction, just as where furniture is injured by water used to quench the fire, or a mirror is broken by the falling of materials loosened by the flames, in which cases it would hardly be contended that the loss was not by fire. The Lord President thought that if the gable had fallen during the fire and caused the destruction,

¹ Lowrie, C. J., in *Citizens' Ins. Co. v. Marsh*, 5 Penn. St. 387, overruling s. c. 2 Pittsburgh Rep. (Crumrine) 273.

² 3 Cush. (Mass.) 328.

it would not have been doubted that the loss was covered by the policy, and he could not see that the interval which actually elapsed could make any difference in the principle. The cause of the loss was in either case the same.¹ Where, however, the walls of a warehouse, from weakness or other cause not proceeding from fire, and without its agency, fell in upon themselves, becoming, with the goods contained therein, one mass of ruin, out of which fire proceeded, it was held that this was not a loss by fire. When the fire took place the subject insured had ceased to be, and had become a congeries of materials. The cause of the loss was the fall, and not the fire. The fire did not produce the fall, but the fall produced the fire, and the destruction was by the former. That a fire sprung up after the fall in the rubbish and consumed the fallen materials, was immaterial. The heap of rubbish was not insured. The building alone was insured, and that at the time of the fire had ceased to be, and that too by reason of a peril not insured against. The fire in this case was not the efficient or proximate cause of the loss.² But where one building became undermined and fell, covering in its ruins certain chemicals which took fire, which fire communicated with another building, a part of which, with the goods therein, had been involved in the crash, but a part also had remained standing with the goods undisturbed, an action to recover for damage by fire to the goods so remaining undisturbed was sustained.³ It was contended by the defendants in this case that after the fall of part of the building the goods could no longer be said to be "contained therein," within the meaning of the policy. But the court were not of that opinion. They were certainly as much contained in the building and covered by the policy as if they had been moved out to avoid the fire, but nevertheless had been consumed.

§ 413. Risk — Spontaneous Combustion — Explosion — Ignition — Proximate Cause. — There can be no doubt that fire originating in spontaneous combustion is within the risk

¹ Johnston v. West of Scotland Ins. Co., 7 Cas. Ct. of Sess. (Scotch) 52.

² Nave v. Home Mut. Ins. Co., 37 Mo. 429.

³ Lewis v. Springfield Fire and Mar. Ins. Co., 10 Gray (Mass.), 159.

against fire.¹ The subject of loss by explosion has given rise to much elaborate and learned discussion, and recently to decided differences of opinion, presented on both sides with marked ability, which we shall now proceed to state. The burning of a steamboat by fire, caused by the accidental explosion of gunpowder on board, was early held to be "loss or damage by fire," since the explosion was caused by fire.² And following this case it was held that, where a building was purposely blown up by gunpowder to stay the ravages of a conflagration, and crockery ware stored therein, the crates themselves having been burned after the explosion, was thus destroyed, fire was the proximate cause of the loss.³ But in neither of these cases is there much discussion upon this particular point. Subsequently, in *Scripture v. Lowell Mutual Fire Insurance Company*,⁴ where upon the fact that a cask of gunpowder, being set on fire accidentally by a match, exploded, set fire to a bed, charred and stained some of the woodwork, and blew off the roof of the house, the question was thus stated by the court: "By the ignition of gunpowder within a dwelling-house, damage is done to the house, that damage consisting in part of combustion and part of explosion. Is the *whole* damage covered by a policy insuring against 'loss or damage by fire?'" And after a very able and learned examination of the question in all its bearings, the conclusion arrived at was that "when the effects produced are the immediate results of the action of a burning substance in contact with a building, it is immaterial whether these results manifest themselves in the form of combustion or of explosion, or of both combined. In either case the damage occurring is by the action of fire, and covered by the ordinary terms of a policy against fire." "The question," says Cushing, J., who gave the opinion, "is a nice one. Upon careful reflection, however, we have come to the conclusion that the received opinions on the subject, and the adjudications referred to, are

¹ Brit. Am. Ins. Co. v. Joseph, 9 Lower Canada (Q. B.), 448.

² Waters v. Merchants' Louisville Ins. Co., 11 Pet. (U. S.) 213.

³ City Fire Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367.

⁴ 10 Cush. (Mass.) 356.

in accordance with reason and principle. It seems not to be denied that actual combustion, produced by the ignition of gunpowder, is within the present policy. If, then, a combustible substance, in the process of combustion, produces explosion also, it is not easy to perceive why, of the diverse but concurrent results of the combustion, the one should be ascribed to fire any more than the other. The plain fact here is the application of fire to a substance susceptible of ignition, the consequent ignition of that substance, and immediate damage to the premises thereby. It is no sufficient answer to say that some of the phenomena produced are in the form of explosion. All the effects, whatever they may be in form, are the natural results of the combustion of a combustible substance ; and as the combustion is the action of fire, this must be held to be the proximate and legal cause of all the damage done to the premises of the plaintiff. . . .

“ In the present case, there is no room for question concerning a series of causes, as whether primary or secondary, proximate or remote ; for the agent is one and the same throughout, namely, fire. The *causa* was burning powder ; the *causa causans* was burning a match ; at each stage of causation it was the action of fire. Nay, to be exact, the burning of the gunpowder, like the burning of the match, was a succession of several complex acts of burning. Yet fire is the agent at each of these distinct stages of causation. Suppose there was a barrel of sulphur in the plaintiff's attic, instead of gunpowder ; and this being ignited with a match, afterwards the fire had passed from the burning sulphur to the substance of the house. This would be recognized at once as a case of fire. It does not change the legal relation of causes to substitute a barrel of burning gunpowder for a barrel of burning sulphur. The only difference in the elements of the question is, that the gunpowder, when ignited, consumes with more of rapidity than sulphur, and the combustion is accompanied or followed by explosion. Still, the agent is fire, though it acts in different ways upon the different successive subjects of its action, beginning with the match and terminating with the plaintiff's house.

“ On the other hand, cases are conceivable, other than by

the use of gunpowder, of explosion without any combustion, which, nevertheless, being the result of the action of fire, are still, it would seem, within the range of the general principle. Various mineral substances exist, of value in commerce and the arts, which explode by the action of fire, without either ignition or combustion. In general, any close vessel, of whatever material composed, when filled with an expansive fluid, is liable to explode by the action of heat, though it may be that the vessel and its contents are alike incombustible. The same thing happens, under certain conditions, to some forms of wood, which, although combustible, may by the action of fire explode without ignition ; or which, as in the present case, of a house, by having compressed within it some burning substance, which is explosive as well as combustible, like gunpowder, may suffer the double injury of combustion in part, and in part of explosion. . . . In the hypothesis that fire is to be regarded as *causa proxima* in the present case, we can see but one supposable defect, namely, the suggestion that though it be conceded that the explosion of burning gunpowder and its effects are the action of fire, yet this particular effect on the building is not exhibited in the form of igneous action. The cases above supposed, of the shrivelling of some masterpiece of pictorial art, the cracking or discoloring of some rich vase or gem, the bursting of a cask of wine through the expansion of its contents, — these, it may be said, are distinctly cases of damage, without ignition it is true, but by the direct and specific action of heat as such ; while it is denied that such is the fact in the present case of the blowing up of a dwelling-house by the ignition of gunpowder. We do not think the premises of this argument are sustained by the physical facts which occurred. If they were so, then the nearest analogy would be of damage by smoke ; that is, the moisture thrown off by burning wood, and carrying with it ashes, empyreumatic oil, and other constituent parts of the wood, either in their natural condition, or transformed by the process of combustion. Now it is obvious that mere smoke, without any direct action of heat, may do great damage to many kinds of merchandise, such as delicate textile fabrics, esculent vege-

tables, articles of taste, and other numerous objects; and if a dwelling or a magazine take fire, and some parts of it only be consumed, but the contents of the apartments to which the actual fire does not extend are nevertheless damaged by the smoke penetrating into and filling them, can it be doubted that the damage thus done is a loss within the ordinary conditions of a fire policy?¹ Yet, incontestably, damage by smoke is an effect which is not in itself igneous action, though it be the result thereof; while, as we conceive, the explosion of gunpowder is igneous action.”

§ 414. **Risk — Explosion — Concussion.** — The court in the last case cited expressly avoided giving an opinion in cases where there is no ignition or combustion, and where the damage is caused merely by concussion. The question of liability in such a case arose in England,² where the property was injured by the concussion consequent on the explosion of a powder magazine situated at some distance from the property insured, and it was held that it could not be said that in that instance the loss was “occasioned by fire.” It was occasioned by a concussion caused by fire. And to the same effect, upon similar facts, was the case of *Caballero v. Home Mutual Insurance Company*.³

§ 415. **Risk — Explosion — Steam.** — It was early held that under an ordinary policy against loss by fire, loss by explosion of a steam-boiler, the explosion not being caused by any unusual fire, and no fire supervening, no recovery can be had. Such an explosion could not be distinguished from the breaking or derangement of any other part of the machinery.⁴ It has also been held by a divided opinion that if the fire is caused by the explosion of a steam-boiler, and the policy provides against liability “for any loss occasioned by the explosion of a steam-boiler,” the loss thereby is not recoverable under the terms of the policy.⁵ So where the policy provided that the company should not be liable for loss “by fire which

¹ *Semble*, per Gibbs, C. J., *arguendo*, in *Austin v. Drewe*, Holt, N. P. 127.

² *Everett v. London Ass. Co.*, 19 C. B. 126.

³ 15 La. An. 217.

⁴ *Millaudon v. Orleans Ins. Co.*, 4 La. An. 15.

⁵ *St. John v. Am. Mut. Mar. and Fire Ins. Co.*, 1 Duer (N. Y. Superior Ct.), 371; s. c. affirmed, 1 Ker. (N. Y.) 516.

shall happen or arise by any explosion," nor for loss "by explosion of any kind," it was held that the insurers were not liable for damage by fire which originated from, and was caused by, the explosion of a steam-boiler used on the premises.¹ Nor, it has also been said, would they be liable under an exemption from loss "by fire which might occur by means of explosion," if the explosion sets in operation the fire which burns the insured property, though the fire may travel from the seat of explosion through other buildings continuously to the building burned. In order to render the company liable, a new force or power sufficient to cause the fire must intervene; and the incidental facts of intervening buildings and favoring winds are not the equivalent of this new force.² But in a very recent case³ the question came again under discussion where the provision of the policy was that the insurers should not be liable "for any loss or damage by fire, caused by means of an invasion, insurrection, riot, civil commotion, or military or usurped power . . . nor for any loss caused by the explosion of gunpowder, camphene, or any explosive substance, or explosion of any kind," with a different result. The question was whether under this form of policy the insurers were liable for loss by fire caused by explosion.⁴ After adverting to *Hayward v. Liverpool and London Insurance Company*,⁵ as expressly in words excluding such liability, and to *St. John v. American Mutual Insurance Company*,⁶ as in the negative by a divided opinion, and pointing out the fact that the opinions of the several judges, constituting the majority, were based not merely upon different, but inconsistent grounds, thus substantially depriving the decision of its claim to be considered as an authority, and further referring to *Stanley v. Western Insurance Company*⁷ as in point for the insurers, the court proceeds: —

¹ *Hayward v. Liv. and Lon. Fire and Life Ins. Co.*, 7 Bosw. (N. Y. Superior Ct.) 385.

² *Ins. Co. v. Tweed*, 7 Wall. (N. Y.) 44.

³ *Commercial Ins. Co. v. Robinson*, Sup. Ct. of Ill., 2 Ins. L. J. 381.

⁴ The report in the *Journal* does not state what exploded; nor does it seem to be material.

⁵ 7 Bosw. (N. Y. Superior Ct.) 385.

⁶ 1 Ker. (N. Y.) 516.

⁷ 3 Exch. 71.

“If this were a question as to an alleged rule or principle of the common law, with these authorities cited on the one side and none upon the other, we might repose securely upon them, and hold them decisive of the case before us. But it is simply a question as to the interpretation of a few words in a written instrument, which are susceptible of two different interpretations. We are to determine which is the more reasonable construction; and if our judgment is satisfied on this point, we must accept its conclusions, though differing from those of the courts to which reference has been made. Let us remark, in the first place, that equivocal expressions in a policy of insurance, whereby it is sought to narrow the range of the obligations these companies profess to assume, are to be interpreted most strongly against the company.¹ The companies have the preparation of their own policies, the choice of language in which to express their obligations, and they show a studious solicitude to limit their liability. Their policies are prolix with provisions of this character, and the public must accept them or go without insurance. We have no right to censure the companies for this, and do not; but the reading of a policy furnishes a sufficient reason for the rule of interpretation formerly laid down by this court.

“It will be observed that in a clause of the policy preceding the one under consideration, the company stipulated that it should not be liable for any loss or damage *by fire*, caused by means of an invasion, insurrection, &c. Here exemption is specially secured against liability for losses *by fire* caused by explosion. The difference in phraseology between the two clauses is so marked that, when we consider their connection with each other, we cannot resist the conclusion that the difference was intended.

“Whether the difference was intentional or not cannot be certainly ascertained, but it is reasonable to resolve the doubt against the company. The object of the company’s existence is to insure against fire. That is what it holds itself out to the public as able and willing to do. When a person takes out a policy and pays his premium he takes it for granted,

¹ Aurora Fire Ins. Co. v. Eddy, 49 Ill. 106.

without reading his policy, that he cannot make the risk more hazardous to the company by storing highly inflammable materials upon his premises. He knows that would be acting in bad faith with the company, and that the policy has probably provided against it, but he would have no reason to suppose that among the voluminous stipulations of the policy there would be found one intended to deprive him of its benefit because a fire, which has destroyed his property, originated in another house a half-mile distant, in the explosion of a camphene lamp. Most fires originate in acts of carelessness, and it is chiefly to guard themselves against the carelessness of others that prudent persons insure. Yet the construction of this policy, contended for by the company, would make the assured assume the liability for the carelessness of others. He is thus deprived of the very protection he seeks by his insurance, if, when his house burns up, he can be denied the payment of his policy because the fire was caused by an explosion upon the premises of others. The great fire at Chicago is supposed to have originated in the overturning and explosion of a lamp; but we are not aware that any of the insurance companies that suffered by that fire have sought to interpose this defence, although this clause is a very common one in insurance policies, and was probably contained in many that had been issued on the property there destroyed. Counsel for the company, feeling the unreasonable character of their interpretation of this condition in cases where the fire comes from an explosion on other premises, speak of it as if it referred only to explosions on the premises of the insured. But the policy will bear no such construction or limitation. We must either hold that the clause refers to loss by explosions simply, without reference to fire, or to losses by fire occasioned by explosions anywhere, whether on or remote from the premises. There is no middle term. It must receive one of these constructions, or the other. One is consistent with the context, reasonable in itself, and just to both parties. The other requires the interpolation of two additional words in the policy, is inconsistent with the context, and in a large degree would make fire insurance a mere mockery. We cannot hesitate

which construction to choose. But, say the counsel for the appellant, this company does not profess to insure against losses by explosion, but only by fire, and the clause, construed as we construe it, is unmeaning, or at least useless. But not so. The clause was designed to apply to all cases where the explosion was the immediate cause of the loss.

“Suppose fire is carelessly applied to powder or other explosive substance; an explosion follows, which rends furniture and building. This explosion is the result of the ignition of the explosive material, and it might be claimed that the loss caused thereby was a loss by fire. The courts might not so hold, independently of the clause of the policy, but we can well understand, when we examine these policies, that the insurers may have introduced this clause for the purpose of leaving no room for argument or doubt. Again, suppose a fire is speedily subdued, but before it has ignited powder, and an explosion has taken place which has caused much damage, but has not extended the fire; in such a case the company would claim that they were protected by this clause from liability for the consequences of the explosion. It is not necessary, however, for us to show how the clause was designed to operate. It is sufficient to say that, in our judgment, it cannot receive the construction claimed by the company.”¹

§ 416. **Risk — Explosion — Gas.** — On the other hand, it has been held in a very recent case in Ohio, that a policy insuring against “loss or damage by fire,” but providing that the company shall not be responsible for any “loss or damage occasioned by or resulting from any explosion whatever,” is to be construed as if the excepting clause read “loss or damage by fire,” and does not cover a loss happening from an explosion which takes place by reason of a column of an explosive mixture coming in contact with the flame of a gas-jet, whereby a fire was set in motion which destroyed the property.² The

¹ The cases of *Stanley v. Western Ins. Co.*, 3 Law Rep. (Exch.) 71, usually regarded as opposed to the doctrine of the case just cited from Illinois, and the case of *Harper v. City Fire Ins. Co.*, 1 Bosw. (N. Y. Superior Ct.) 520, are referred to in the next section.

² *Union Life, Fire, and Mar. Ins. Co. v. Foote*, Sup. Ct. Ohio, Dec. 1872, 2 Ins. L. J. 190.

opinion is so able and instructive, that we give its more important parts. Mellvaine, J. : —

“ By the terms of the policy it appears that the plaintiffs were insured against ‘ loss or damage by fire to the amount of five thousand dollars on their stocks of merchandise, consisting principally of liquors, fixtures, tools, and office furniture, contained in their brick building, situate on the south-west corner of Congress and Kilgour Streets, Cincinnati, Ohio, and occupied by them as a liquor store, with privilege of rectifying and manufacturing fine spirits by steam not generated in the building. The principal defence arose under one of the conditions of the policy, which is in these words : —

“ ‘ VII. This company is not liable for loss or damage by lightning or tornado, unless expressly mentioned or insured against, but will be responsible for loss or damage to property consumed by fire occasioned by lightning. Nor will this company be responsible for any loss or damage to property consumed by fire happening by reason of or occasioned by any invasion, insurrection, riot, or civil commotion, of any military or usurped power, nor where the loss is occasioned or superinduced by fraud, dishonesty, or criminal conduct of the insured, *nor to any loss or damage occasioned by or resulting from any explosion whatever, whether of steam, gunpowder, camphene, coal-oil, gas, nitro-glycerine, or any explosive article or substance, unless expressly insured against, and special premium paid therefor.*’

“ The testimony shows that at the time of taking out the policy, and until the time of the fire, the plaintiffs were engaged in the business of rectifying whiskey and manufacturing fine spirits by the use of steam, in the building occupied by them as a liquor store, and in which the insured stock of merchandise, consisting principally of liquors, &c., was kept. The size of the building was sixty by one hundred and eighty feet, and was four stories high. There was communication between the stories through open stairways and hatches. The business of rectifying was carried on in the basement story, where the stills — large metallic vessels — were located. The upper stories were chiefly used for storage of liquors and cooperage. The process

of rectifying was conducted as follows: The raw spirits or liquor was conveyed by means of pipes called leaders from the tubs situate in the upper stories to the stills below; when the stills were thus charged, the liquor therein was converted into vapor by means of steam which passed through the stills in copper pipes called worms; the vapor thus evolved was conducted by other pipes to a condenser, where it was reduced to a liquid state. The vapor evolved in the process of rectification is an inflammable substance. It readily mixes with the atmosphere, and when so mixed in certain proportions is explosive, and when such mixture is brought into contact with flame it explodes. On the morning of the fire a large still was being charged through a leader about two inches in diameter, which passes into its still through a *vacuum valve* (an aperture in the still near its top), the diameter of which was about four inches. At the same time steam was passing through the worm, converting the liquor in the still into vapor, which escaped through the vacuum valve into the still-room, and thence no doubt into the other parts of the building. The process of thus discharging the still, accompanied with the discharge of vapor, had continued for some time, — perhaps an hour preceding the fire. During the progress of this process, two jets of gas were burning in the still-room, one at a distance of three or four feet from the vacuum valve, and the other in another part of the room. There was no other fire or flame in the room or in the building at the time.

“Such being the circumstances, an explosion took place in the still-room. A sudden and violent combustion of the vapor, accompanied with a noise, described by one witness as being like the crack of a gun; by another, as if a bundle of iron had been thrown on the pavement; by another, as a crash, and by another, as a gush of fire, and at the same instant the flame was driven through a doorway into another building, whereby a witness was badly burned. Immediately after the explosion a flame was discovered escaping from the still through the vacuum valve, and at the same time the building was discovered to be on fire throughout the several stories. From these facts and circumstances, we think it was clearly shown that the

fire, by which the building and stock of merchandise insured were consumed, was occasioned by and resulted from an explosion of spirit vapor mixed with atmosphere, and that the explosion was caused by the mixture coming in contact with the burning gas-jet.

“ 1. The first question which we notice particularly is this : Was the explosion, which in fact occurred, such, in degree of violence, as was contemplated by the parties to the policy ?

“ The word ‘ explosion ’ is variously used in ordinary speech, and is not one that admits of exact definition. Its general characteristics may be described, but the exact facts which constitute what we call by that name are not susceptible of such statement as will always distinguish the occurrences. It must be conceded that every combustion of an explosive substance, whereby other property is ignited and consumed, would not be an explosion within the ordinary meaning of the term. It is not used as the synonym of combustion. An explosion may be described generally as a sudden and rapid combustion, causing violent expansion of the air, and accompanied by a report. But the rapidity of the combustion, the violence of the expansion, and the vehemence of the report, vary in intensity as often as the occurrences multiply. Hence, an explosion is an idea of degrees, and the true meaning of the word, in each particular case, must be settled, not by any fixed standard or accurate measurement, but by the common experience and notions of men in matters of that sort. In this case, although the building was not rent asunder, or the property therein broken to pieces, there was a sudden flash of flame, a-rush of air, and a report like the ‘ crack of a gun,’ which certainly brings the occurrence within the common meaning of the word as used in many instances. ‘ Any explosion whatever ’ is the phrase used in the condition to the policy, and it is qualified by the context only to the extent that it must be an ‘ explosion ’ of some ‘ explosive substance, and of sufficient force as to result in loss or damage to the property insured.’ And these characteristics we have found to exist in the occurrence that resulted in the loss of the insured property.

“ 2. It is claimed that the fire which destroyed the property

insured did not result from the explosion, but, on the contrary, that the explosion was incident to and caused by the fire, which, if there had been no explosion, would have accomplished the whole loss and damage; or, at least, that such inference may be drawn from the facts in the case as fairly and legitimately as contrary inferences.

“ The proof unquestionably shows that the origin of the fire and the explosion was simultaneous. It may be true, in a strictly scientific sense, that all explosions caused by combustion are preceded by a fire. The scientist may demonstrate, in a case where gunpowder is destroyed by fire, or in any case where the explosion is caused by or accompanies combustion, that ignition and combustion precedes the explosion; but the common mind has no conception of such combustion, as a fact independent of the explosion, where they concur in such rapid succession that no appreciable space of time intervenes. The terms of this policy must be taken in their ordinary sense; and we are satisfied that the proofs show, according to the ordinary sense and understanding of men in reference to such matters, that the explosion occasioned the fire which destroyed the property insured; or, in other words, that the loss resulted from an explosion, within the true intent and meaning of this policy.

“ It is true that the explosion was caused by a burning gas-jet, but that was not such fire, as contemplated by the parties, as the peril insured against. The gas-jet, though burning, was not a destructive force, against the immediate effects of which the policy was intended as a protection. Although it was a possible means of putting such destructive force in motion, it was no more the peril insured against than a friction-match in the pocket of an incendiary. The conclusions of fact to which we thus arrive are mere inferences from other facts, — facts, however, about which there was no conflict in the testimony, — yet they are so manifestly true that we think it was an error of law, under our statute, to reverse the judgment rendered thereon at the special term of the Superior Court, upon the strength of contrary inferences drawn from the same facts by the reviewing court.

“ 3. The next question arises upon the terms of the policy,

and is one of construction purely. Was it intended by the provisions of the seventh condition to exempt from the risks assumed by the policy losses BY *fire* occasioned by an explosion ?

“ It is claimed that the clause exempting losses by explosion taken alone, or construed in connection with other clauses in the condition, does not show such intention. It is true that the words ‘ by fire,’ or their equivalent, are omitted in this clause, though expressed in some of the former clauses ; the foundation point, however, in construing this condition, is found in the general undertaking of the policy. It will be observed that the underwriter undertook to insure against loss and damage by fire only, but, nevertheless, against loss and damage by fire generally ; and the maxim, *causa proxima non remota spectatur* applies. Now we think, without doubting, that the purpose of inserting this condition was to relax the rigor of this maxim, and exempt from the general risk of the policy certain losses, which would otherwise fall within its scope and meaning. The first clause of the condition provides that ‘ this company is not liable for loss or damage by lightning or tornado, unless expressly mentioned and insured against.’ If this were the whole of the clause, and it were not understood that the loss and damage referred to were such as might result from *fire occasioned by lightning or tornado*, it would be utterly meaningless and nugatory, for the reason that the underwriter had not undertaken to insure against lightning or tornado. So far the construction is plain enough ; but a difficulty arises from the conclusion of the clause, to wit, ‘ but will be responsible for loss or damage to property consumed by fire occasioned by lightning.’ The exception to the rule of exemption from loss by lightning appears to be as broad as the rule itself. But I apprehend that a case might arise in which effect and operation could be given to all the terms of this clause, including those which are implied as well as those expressed. At all events, it is perfectly clear that loss and damage by lightning and tornado are not within the expressed risks of the policy, unless a fire supervenes ; nor is there any thing in the policy from which such risks can be implied.

“ The condition continues : ‘ Nor will the company be responsible for any loss or damage to property consumed by fire happening by reason of or occasioned by any invasion, insurrection, riot, or civil commotion, or any military or usurped power.’ The exemptions here provided for are expressly limited to losses within the terms of the general risk of the policy. But if such limitation had not been expressed, it would have been implied.

“ The next clause is as follows : ‘ Nor where the loss is occasioned or superinduced by the fraud, dishonesty, or criminal conduct of the insured.’ There is no pretext for holding that the loss here contemplated is other than loss by fire, although no such qualification is expressed. Then follows the clause in question, which, to all intents and purposes, is framed like the preceding one : ‘ Nor to any loss or damage occasioned by or resulting from any explosion whatever, whether of steam, gunpowder, camphene, coal-oil, gas, nitro-glycerine, or any explosive article or substance, unless expressly insured against and special premium paid therefor.’

“ Unless there is something in the subject-matter of this clause that indicates that the words ‘ by fire ’ were omitted for the purpose of showing a design and intention to adhere to and continue the general risk in case an explosion should result in a fire, we think that they or their equivalents should be supplied by implication or construction. Is such purpose indicated by any fair use of the terms employed ? That a loss, or any other combustion, results from an explosion, where the explosion itself is caused by a destructive fire already in progress, comes within the general risk of a policy against fire only, is a doctrine not only reasonable in itself, but is sustained by authority.¹ And it is quite clear that a loss by fire, which is occasioned by an explosion, is within the like risk. Now, the express terms of this clause are ‘ any loss or damage occasioned by or resulting from any explosion whatever.’ These terms are certainly comprehensive enough to include both descriptions of loss, — whether loss by the explosive force, or loss by

¹ *Waters v. La. Mer. Ins. Co.*, 11 Pet. 255 ; *Scripture v. Low. Mut. Fire Ins. Co.*, 10 Cush. 357 ; *Millaudon v. N. O. Ins. Co.*, 4 La. An. 15.

superinduced combustion. And that such is their legal effect has been directly decided in the case of *Stanley v. Western Insurance Company*.¹ It is not necessary at this time to either approve or disapprove to the whole extent the doctrine in Stanley's case, as in this case no damage was sustained from the explosion without the intervention of a fire, nor, indeed, was the explosion caused by a fire within the meaning of the policy.² But we can find no good reason for doubting that loss and damage by fire, resulting from an explosion, was intended to be exempted by this condition from the general risk of the policy, and are of opinion, therefore, that this clause, properly construed, should read, 'nor any loss or damage by fire occasioned by or resulting from any explosion whatever.'

"4. It is claimed by defendants in error that the peril by which the property insured was destroyed was within the exception to the seventh condition : that is, it was 'expressly insured against, and special premium paid therefor;' or, in other words, was excepted out of the exception.

"The reasoning by which this proposition is sought to be maintained is thus stated : —

"The body of the policy covered loss by fire on liquors, &c., with the privilege of rectifying and manufacturing fine spirits by steam not generated in the building. The property insured was whiskey, as well in the process of rectification and manufacture as manufactured whiskey in the still, as well as spirits in the barrel, — the whiskey vapor itself, while passing through the columns to the cooler, or wherever else it might make its way.

"If it was in this form an *explosive substance or article*, such

¹ Law Reports, 1868 ; 3 Exch. 71.

² In Stanley's case, the policy exempted the insurers from liability for loss arising from explosion, except explosion by gas. The insured premises were used in the business of extracting oil, during which process a vapor was evolved, which, being mixed with a certain quantity of atmospheric air, became explosive. This vapor escaping came in contact with the flame of the lamps, and an explosion ensued, succeeded by a fire. The court held that the gas intended by the policy was ordinary illuminating gas, and that the insurers were not liable for loss by concussion or from fire occasioned by the explosion, but were liable for loss, if there was any, by reason of the original fire, or any subsequent extension of that fire unconnected with the explosion.

as is intended by the language of the condition, or if in the process of manufacture allowed by the policy it was likely to become such by escape and mingling with the air in the building, then the insurance was upon it, as an agent known to be explosive under certain circumstances likely to happen, and with the express assent of the company to the carrying on of that process, in the course of which its explosive nature would naturally and probably be developed.

“The principle sought by this argument to be applied is announced in *Harper v. New York City Insurance Company*; the condition exempted the company from liability *for loss occasioned by camphene*. The fire was occasioned by a workman's throwing a lighted match into a pan upon the floor containing camphene. The risk was upon a printing stock, privileged for a printing-office, camphene not being expressly enumerated. But it was shown that that article was a usual part of such a stock, and its use was therefore authorized. For this reason alone, because it was implicitly insured, it was held that the exception did not apply.

“The following extract from the opinion expresses its doctrine:—

“‘A policy can be so framed as to allow the presence of a dangerous article, and even so as to insure its value, while at the same time it might exempt the insurer from loss if occasioned by the presence or use of the article. But I think it would need very great precision of language to express such an intention. Where camphene or any hazardous fluid is insured, and its use is plainly admitted, the dangers arising from that source are so obviously within the risk undertaken, that effect should be given to the policy accordingly, unless a different intention is very plainly declared.’

“In answer to this claim, we say:—

“1. That the spirit vapor, having escaped from its confinement and passed into the still-room, where it became mixed with atmosphere so as to form an explosive substance, under circumstances that precluded all possibility of reclaiming and utilizing it, was no longer a part of the stock of merchandise insured, and was not under the protection of the policy.

"2. If, from the nature of the property insured, the parties, at the time the risk was taken, might reasonably have anticipated the peril by which it was afterward destroyed, it is reasonable to suppose that such peril was in contemplation at the time, and that they contracted in reference to it. Hence, if the general risk of the policy was expressed in terms broad enough to include the peril, it must be presumed that they intended to do so ; and, on the other hand, if an exception to the risk was made in terms which fairly and plainly took such particular peril out of the general risk, it must be presumed that they intended to exempt such particular peril from the risk. Again, if it be claimed that there was an exception to such exemption, whereby the particular peril was saved from the exemption and left under the general risk, it is reasonable that the terms of exception should be at least as explicit as the terms of exemption. How is it in this case ? The risk was against all loss by fire.

"The exception from the risk was 'any loss or damage occasioned by an explosion of steam, gunpowder, &c.' The exception to this exemption was, 'unless expressly insured against, and special premium paid therefor.' Therefore it only remains to be said, that no loss or damage occasioned by an explosion of any of these substances named was expressly insured against, nor was any special premium paid for any such special risk."

§ 417. **Risk — Collision — Proximate Cause.** — A case of considerable delicacy has recently been before the United States Circuit Court for Connecticut, — the case of the *Norwich and New York Transportation Company v. The Western Massachusetts Insurance Company*,¹ — in which the question was, whether where a steamer collided with a sailing vessel, whereby the steamer was so much disabled that she sank till the water rose to her furnaces and forced the fire out upon her wood-work, which continued to burn till her upper works were consumed, when she sank and became a total loss, — whether this was a loss by fire. And it was held that this depended upon the fact, submitted to the jury, whether but for the intervention of the fire she would have filled and gone to the bottom.

¹ 34 Conn. 561.

If she would, then it was not a loss by fire; but if, on the other hand, she would only have filled and partially sank, had not the fire intervened, but yet remained in such a condition that she might have been towed to a place of safety and repaired, then it was a loss by fire. The fire was the proximate cause of the loss.

The same facts in another case¹ came before the court, and went, on appeal, to the Supreme Court. The case was tried without the intervention of a jury, and the court below found as follows:—

“While on one of her regular trips from Norwich to New York, on Long Island Sound, the steamer collided with a schooner, the latter striking her on her port side, and cutting into her hull below the water line, in consequence of which she immediately and rapidly began to fill with water. Within ten or fifteen minutes after the collision, the water reached the floor of the furnace, and the steam thereby generated blew out the fire, which communicated with the woodwork of the boat. Her upper works and her combustible freight were soon enveloped in flames, and they continued to burn half or three quarters of an hour, when she gradually sank in twenty fathoms of water, keeling over. The steamer was so constructed that her main deck was completely housed in from stem to stern, up to her promenade, or hurricane deck above. Her freight was stowed on the main deck, and her cabin and state-rooms were on the hurricane deck. From the effects of the collision alone she would not have sunk below her promenade deck, but would have remained there suspended in the water, and would have been towed to a place of safety, where she, her engines, tackle, and furniture could have been repaired and restored to their condition prior to the collision for the sum of fifteen thousand dollars, the expense of towage included. The sinking of the steamer below her promenade deck was the result of the action of the fire in burning off her light upper works and housing, thus liberating her freight, allowing much of it to drift away, whereby her floating capacity was greatly reduced, so that she sunk to the bottom, and all the damage

¹ Howard Fire Ins. Co. v. Norwich & N. Y. Transp. Co., 12 Wall. (U. S.) 194.

which she suffered beyond the fifteen thousand dollars above named as chargeable to the collision (amounting to seventy-three thousand dollars), including the cost of raising the boat, was the natural and necessary result of the fire, and of the fire *only*.

“It is now urged in behalf of the plaintiffs in error that these findings establish the sinking of the steamer, wherein consisted principally the loss, or that part of it in excess of fifteen thousand dollars chargeable to the collision, was the result of two concurrent causes, one the fire, and the other the water in the steamer’s hold, let in by the breach made by the collision. As the influx of the water was the direct and necessary consequence of the collision, it is argued that the collision was the predominating, and, therefore, the proximate cause of the loss. The argument overlooks the fact, distinctly found, that the damage resulting from the sinking of the vessel was the natural and necessary result of the fire only. If it be said that this was but an inference from facts previously found, it was not for that reason necessarily a mere legal conclusion.

“But we need not rely upon this. Apart from that finding, the other findings, unquestionably of facts, show that neither the collision, nor the presence of water in the steamer’s hold, was the predominating, efficient cause of her going to the bottom. That result required the agency of the fire. It is found that the water would not have caused the vessel to sink below her promenade deck, had not some other cause of sinking supervened. It would have expended its force at that point. The effect of the fire was necessary to give it additional efficiency.

“The fire was, therefore, the efficient, predominating cause, as well as nearest in time to the catastrophe, which not only directly contributed to all the damage done, after the steamer had sunk to her promenade deck, but enlarged the destructive power of the water, and rendered certain the submergence of the vessel. This plainly appears, if we suppose that the fire had occurred on the day after the collision, and had originated from some other cause than the collision itself.

The effects of the prior disaster would then have been complete.

“The steamer would have been full of water, sunk to her promenade deck, and, remaining thus suspended, would have been towed to a place of safety and saved, in that condition, to her owners, except for the new injury. But the fire occurring on the next day, destroying the upper works and the housing, thus liberating the light freight and greatly reducing the floating capacity of the steamer, would have caused her to sink to the bottom as she did. In the case supposed, the water would have been as truly a concurrent and efficient cause of the steamer’s sinking, as it was in the case now in hand. It would have operated in precisely the same manner, remaining dormant until given new activity. But could there have been any hesitation in that case, in determining which was the proximate, the efficient, predominating cause of the sinking of the vessel? And can it be doubted that the underwriters against loss by fire would be held responsible for such a loss?

“Wherein does the case supposed differ in principle from the present, when the facts found are considered? True, the fire in this case was caused by the collision, but the policy insured against fire caused by collision. True, the fire immediately followed the filling of the steamer with water, or commenced while she was filling, but the effects of the fire are conclusively distinguished from the breach in the steamer’s hull, and the filling of her hold with water.

“The damages caused by the several agencies have been discriminated, and its proper share assigned to each. It is an established fact that the damaging effect of the water, independent of the fire, would not have reached beyond sinking of the steamer to its upper deck, when she would have been saved from further injury.

“There is, undoubtedly, difficulty in many cases attending the application of the maxim, ‘proxima causa, non remota spectatur,’ but none when the causes succeed each other in order of time. In such cases the rule is plain. When one of several successive causes is sufficient to produce the effect, for example, to cause a loss, the law will never regard an ante-

cedent cause of that cause, or the 'causa causans.'¹ In such a case there is no doubt which cause is the proximate one within the meaning of the maxim. But when there is no order of succession in time, when there are two concurrent causes of a loss, the predominating, efficient one must be regarded as the proximate when the damage done by each cannot be distinguished."

§ 418. **Risk — Explosion — Proximate Cause.** — An interesting marine case was recently before the New York Commission of Appeals,² in which arose the question whether a steamship which was insured under a policy which excepted loss by the bursting of boilers, but covered all losses "occurring subsequent to and in consequence of such bursting," and the loss of which was occasioned by such a violent explosion as to sink her in five or ten minutes, was protected by the policy. And it was held that she was not, on the ground that upon the explosion the vessel became valueless, and the loss total and immediate, and not subsequent to the cause that occasioned it.³ We have already seen⁴ that where a building falls in ruins, and the ruins take fire from combustion of chemicals which were amongst the stock, no recovery can be had, the destruction being by the fall and not by the fire.

§ 419. **Risk — Intemperance — Wound — Proximate Cause.** — Intemperance, doubtless, in a general sense, shortens life; but it is not, therefore, a cause of death within the meaning of a policy made void if the applicant should die by reason of intemperance from the use of intoxicating liquor. The consequences of such a construction would be that an insurance company which had insured the life of one known to be intemperate, and had charged a higher rate of premium on that very account, could exonerate itself from liability by showing that the life of the assured had been shortened by intemperance. A sound principle does not lead to consequences so unjust and

¹ *Gen. Mut. Ins. Co. v. Sherwood*, 14 How. 366.

² *Evans v. Columbian Ins. Co.*, 44 N. Y. 146.

³ *Hunt, C.*, dissents in an opinion of great force and acuteness, to which we refer, as containing some excellent illustrations of the distinction between proximate, mediate, and remote causes.

⁴ *Nave v. Home Ins. Co.*, 37 Mo., *ante*, § 412.

unreasonable. A proximate cause of an effect is that which immediately precedes and produces it, as distinguished from the remote, mediate, or predisposing cause. When several causes contribute to death as a result, it may be difficult to determine which was the remote and which the immediate cause, yet this difficulty does not remove the necessity of such determination.¹ The same case came before the court again;² when it appeared that the insured in a fit of *delirium tremens* escaped from those having him in charge, ran out into the streets, and was exposed in scanty clothing to the inclemency of the weather, which exposure contributed, with intemperance, to bring on congestion of the lungs, of which he died. And the court held that these facts would support a defence on the ground of intemperance under a clause exempting the insurers from liability if the insured should die "by reason of intemperance from the use of intoxicating liquor." Whether the congestion was caused by the exposure or intemperance, they were both the direct consequences of his intemperate use of intoxicating liquor. And where the insured was wounded, and the wound, not causing his death, caused him to fall into the water, whereby he was drowned, it was held to be a death by accident. And on appeal the court say: —

"The part of the charge to the effect that if the wound led to the cause of the death then it would be an accidental death, could have been understood only in the sense of the wound being produced by an accident, but that this, not causing death, did cause him to fall into the water where he died from drowning, then the death was accidental; so understood it was entirely correct."³

§ 420. **Risk — Property covered by the Policy.** — If it be doubtful what goods are covered by the policy, the doubt will be resolved against the insurers.⁴ A policy on "wearing apparel, furniture, and stock of a grocery," does not cover "linen and sheets" smuggled and intended for sale; and a

¹ *Miller v. Mut. Ben. Life Ins. Co.*, 31 Iowa, 216.

² 34 Iowa, 222.

³ *Mallory v. Traveller Ins. Co.*, 47 N. Y. 52.

⁴ *Franklin Fire Ins. Co. v. Updegraff*, 43 Penn. St. 350; *Clark v. Firemen's Ins. Co.*, 18 La. 431.

watch, being a memorandum article, is not included in wearing apparel;¹ nor is a stock of linen drapery goods included in "furniture, linen, wearing apparel, and plate."² "Stock in trade," as applicable to mechanical pursuits, is to have a more extended application than as applied to a merchant's stock in trade. It includes, in the former case, the fixtures and implements of business.³ Furniture and movables are not "fixtures."⁴ "Jewelry and clothing," being stock in trade, will not cover musical instruments, surgical instruments, guns, pistols, and books;⁵ but "stock of watches, watch trimmings, &c.," includes within its comprehension plate, silver ware, and the tools of trade, and such other articles as form part of similar stocks in the locality where the insurance is effected.⁶ "House" or "building" embraces every thing appurtenant and necessary to the main building, and used and connected with it.⁷ "Shipyard" embraces such places as are ordinarily used as part of the yard, though within the street.⁸ And "on the line of the road" includes all branches used by the railroad.⁹ But an "unfinished house" does not include materials prepared for its completion, and deposited in an adjoining one which was also insured.¹⁰ Nor does insurance on a "bark now being built" include materials prepared to put into her, lying about the yard.¹¹ Such materials are not covered by the policy until they become part of the vessel.¹² But "stock of lumber" will include pieces partly prepared to put into the vessel.¹³ "Steam saw-mill" includes machinery

¹ *Clary v. Prot. Ins. Co.*, Wright (Ohio), 227.

² *Watchorn v. Langford*, 3 Camp. (N. P.) 422.

³ *Moadinger v. Mech. Fire Ins. Co.*, 2 Hall (N. Y. Superior Ct.), 372.

⁴ *Holmes v. Charlestown Mut. Ins. Co.*, 10 Met. (Mass.) 211.

⁵ *Rafael v. Nashville Mar. and Fire Ins. Co.*, 7 La. An. 244.

⁶ *Crosby v. Franklin Ins. Co.*, 5 Gray (Mass.), 504.

⁷ *Workman v. Ins. Co.*, 2 La. 507; *Blake v. Exch. Mut. Ins. Co.*, 12 Gray (Mass.), 265; *White v. Mut. Fire Ins. Co.*, 8 Gray (Mass.), 566.

⁸ *Webb v. Nat. Fire Ins. Co.*, 2 Sandf. (Superior Ct. N. Y.) 497.

⁹ *Fitchburg R. R. Co. v. Ch. Mut. Ins. Co.*, 7 Gray (Mass.), 64.

¹⁰ *Ellmaker v. Franklin Fire Ins. Co.*, 5 Penn. St. 183.

¹¹ *Mason v. Franklin Ins. Co.*, 12 G. & J. (Md.) 468.

¹² *Hood v. Manhattan Fire Ins. Co.*, 1 Ker. (N. Y.) 532, reversing s. c. 2 Duer (Superior Ct. N. Y.), 191.

¹³ *Webb v. Nat. Fire Ins. Co.*, 2 Sandf. (Superior Ct. N. Y.) 497.

necessary to its operation.¹ And so does "starch factory."² "Merchandise" does not cover articles kept wholly or partially for use.³

§ 421. **Risk — Property included — Goods in Trust.** — The words "held in trust," applied to goods insured, mean goods with which the assured is intrusted; not goods held in trust in the strict technical sense, so held that there is only an equitable obligation in the assured, enforceable by subpoena in chancery, but goods with which they are intrusted in the ordinary sense of the word.⁴ And where a general policy upon goods in trust was taken out, and it was represented by the applicant that he desired insurance upon such goods as he should receive from time to time to secure him for advances, it was held that the policy covered only such goods as at the time of the loss he had made advances upon.⁵ Whether the goods insured are held in trust is sometimes a question of not a little difficulty. The following case is of importance upon this point, and well illustrates the distinction between a sale and a bailment: —

The respondents, who were millers, received wheat from different farmers. The wheat, on receipt, was, with the consent of the farmers, mixed with other wheat, and became part of the millers' current stock. The millers could at any time grind or sell the wheat so received. The farmers could at any time claim the price of the wheat delivered by each, according to the market price for wheat of like quality, at the time of payment claimed. There was also some evidence that the farmers had the option of claiming an equal quantity of wheat of like quality, instead of the value in money. The millers often made advances to the farmers on the wheat received from them. The farmers, after a certain time, paid a storage-charge to the millers.

The respondents insured the current stock of wheat in their mill with the appellants. In the proposal for insurance

¹ *Bigler v. N. Y. Central Ins. Co.*, 20 Barb. (N. Y.) 635.

² *Peoria Mar. and Fire Ins. Co., v. Lewis*, 18 Ill. 553.

³ *Burgess v. Alliance Ins. Co.*, 10 Allen (Mass.), 221.

⁴ *Hough et al. v. Peoples' Ins. Co.*, 36 Md. 398.

⁵ *Parks v. Gen. Mut. Ass. Co.*, 5 Mich. 34.

the respondents answered the question whether the insurance was "for self or in trust, and if in trust, on account of whom?" in these words, — "for selves."

A condition of the policy was, that goods held in trust must be insured as such, otherwise the policy would not cover them. The mill and stock were destroyed by fire. To an action on the policy, the appellants pleaded that the statement in the proposal was a misrepresentation, the stock having been held by the respondents "in trust for other persons." On these facts it was held (affirming the judgment of the Supreme Court of South Australia) that the description of the subject of insurance was correct, for that this was not a case of possession given subject to a trust, but of property transferred for value upon special terms of settlement.

A bailment on trust implies that there is reserved to the bailor the right to claim a redelivery of the property deposited in bailment; but wherever there is a delivery of property on a contract for an equivalent in money, or some other valuable commodity, and not for a return of the identical subject-matter in its original or an altered form, this is a transfer of property for value, — a sale, not a bailment.¹

And insurance on "all the articles making up the stock of a pork-house, and all within the building and pertinent thereto," covers every thing properly belonging to the stock of a pork-house, without regard to individual ownership, although the policy states that goods on commission are to be insured as such.²

¹ South Australian Ins. Co. v. Randell, 22 L. T. N. S. 843.

² Ætna Ins. Co. v. Jackson, 16 B. Mon. (Ky.) 250.

CHAPTER XIX.

OF THE LOSS AND ITS ADJUSTMENT, AND TO WHOM PAYABLE.

§ 422. **Amount of Loss recoverable—Life.** — Under the usual contract of life insurance, the loss being total and the policy valued, the question of the amount payable is not open to debate, the amount being fixed by the contract. And the amount to be paid in case of loss may be any sum which the parties may agree upon, as the value of a life may be fixed at any sum, unless, perhaps, it be so large and so disproportional to any possible interest as to raise the presumption that the transaction is not in good faith, but in reality is a gambling speculation. When the insurance is upon one's own life, as the future earnings may be indefinitely large, the insurance may be to an unlimited amount, except as above stated. Though where the insurance is by a creditor on the life of a debtor, the amount should doubtless coincide substantially with the amount of the indebtedness.¹

§ 423. **Amount of Loss recoverable—Fire.** — The general rule of damages in fire insurance, the policy not being a valued one, is indemnification of the insured if the loss be less than, or only equal to, the amount of insurance specified in the policy, without reference to the relation of the amount insured to the whole value of the property insured; and in this loss is included all the loss immediately caused by the fire,² so that the insured may be paid for whatever he had before the fire and was destroyed thereby. Remote and consequential damages, however, such as are caused by an interruption of business, as the loss of custom to an inn,³ or the loss of use of a

¹ See *Mitchell v. Union Life Ins. Co.*, 45 Me. 104.

² *Underhill v. Agawam Mut. Ins. Co.*, 6 Cush. (Mass.) 440; *Peddie v. Quebec Fire Ins. Co.*, 1 Stuart (Lower Canada), 172.

³ *Wright & Pole, In re*, 1 Ad. & El. 621; s. c. 3 Nev. & Man. 819, under the name of *Sun Fire Office v. Wright*.

grist-mill, or the profits of its business, or the expenses of keeping his employés while rebuilding, though in consequence of the fire no return can be had for the wages, are not recoverable as damages.¹ And this was held upon general principles following the authority of Wright and Pole. But in both cases there was a clause which permitted the insurers to make good the loss by repairing if they should so choose, which in the opinion of the court conclusively showed that nothing more than the expense of repairing could be recovered. Neither is the loss of prospective rent recoverable as damages by fire.² But all these several subjects may be specifically insured when, of course, their loss becomes an element of damage.³ The expense of repairing or rebuilding, it has been said, however, is not the measure of damages, since that would give the insured more than he would be entitled to, as having new instead of old. And as there is not in fire insurance, as in marine, a rule of allowing one-third for the difference between new and old, nor any rule of damages, it is for the jury to determine how much money will make good to the insured his loss.⁴ And this is recoverable if within the amount insured, although the value of the property insured is much greater than the loss. The proportion of the loss to the whole amount insured is not in fire, as in marine, insurance an element in the calculation of the amount to be paid.⁵ If the insured is "to contribute a certain proportion of the expense of rebuilding," the proportion is of the value to the estate, not the cost of rebuilding.⁶ The fact that the article to be replaced is patented, is not to enhance its value above the cost of replacing.⁷ The cost of the new, less the difference between that and the value of the old at the time it was destroyed, was

¹ *Menzies v. North Brit. Ins. Co.*, 9 Ct. Sess. Cas. (Scotch) 694; *Niblo v. N. A. Fire Ins. Co.*, 1 Sandf. (Superior Ct. N. Y.) 551.

² *Leonarda v. Phoenix Ass. Co.*, 2 Rob. (La.) 131.

³ See all the above authorities.

⁴ *Brinley v. Nat. Ins. Co.*, 11 Met. (Mass.) 195.

⁵ *Miss. Mut. Ins. Co. v. Ingram*, 34 Miss. 215; *Liscom v. Boston Mut. Ins. Co.*, 9 Met. (Mass.) 205.

⁶ *Commonwealth Ins. Co. v. Sennett*, 37 Penn. St. 205.

⁷ *Ibid.*

said to be the rule in *Vance v. Foster*.¹ In *Morrell v. Irving Fire Insurance Company*,² it is said that the exercise of the option to rebuild converts the insurance contract into a contract to rebuild, and in a suit for damages for the imperfect performance of the new contract, the amount of insurance is no criterion of damages. And in such case an action on the policy cannot be maintained to recover the loss.³

§ 424. **Loss — Amount recoverable — Lessee — Mortgagor — Impost and Excise Duties — Mortgagee — Goods in Trust — Partner.** — Where a building which stood on leased land was destroyed, and the lease expired within a few days, so that the building must be removed or forfeited, or a new lease entered into, it was held that the intrinsic value of the building was the amount recoverable, without reference to the special circumstances.⁴ So a mortgagor whose equity has been seized on execution, recovers according to the value of the property lost, without reference to this circumstance.⁵ But where a leasehold interest is insured, the value of the unexpired lease is the measure of damages.⁶ Goods in the custom-house are to be estimated at their market value, without reference to the fact that the duties may or may not have been paid.⁷ And it has been held that a depression in value caused by special circumstances, which may be temporary only, is not to be taken into account.⁸ But a later case in Lower Canada would seem to be to the contrary.⁹ But where distilled liquors ready for market, but upon which the internal revenue tax was not paid, were destroyed, it was held that as the duty had not been paid, and the destruction left the owner without any personal liability to the government for the tax, though while the property was in existence there was a lien upon it in favor of the

¹ 2 Crawford & Dix, *Nisi Prius* (Irish), 118.

² 33 N. Y. 429.

³ *Beals v. Home Ins. Co.*, 36 N. Y. 522, affirming s. c. 36 Barb. (N. Y.) 614. And see *post*, § 432.

⁴ *Laurent v. Chatham Fire Ins. Co.*, 1 Hall (N. Y. Superior Ct.), 41.

⁵ *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40.

⁶ *Niblo v. N. A. Ins. Co.*, 1 Sandf. (N. Y. Superior Ct.) 551.

⁷ *Wolf v. Howard Ins. Co.*, 1 Sandf. (N. Y. Superior Ct.) 124; s. c. affirmed, 3 Seld. (N. Y.) 583.

⁸ *McCraig v. Quaker City Ins. Co.*, 18 Upper Canada (Q. B.), 130.

⁹ *Grant v. Aetna Ins. Co.*, 11 Lower Canada, 128.

government, the insured could only recover the value of the property destroyed, less the tax.¹ A mortgagee insuring his own interest recovers according to his interest at the time when he commences his suit,² or perhaps more accurately at the time of the loss. That after the loss the mortgagor replaces the property in as good condition as it was before, or the mortgagee, by selling other securities which he holds, reduces his debt, however it may affect the equities between him and the mortgagor, does not affect the terms of the contract between the mortgagee and the insurers. The contingency having arrived upon which the loss was payable, it must be paid according to the status of the interest at the time when the contingency happened.³ To indemnify the mortgagee for all loss to property means to the amount of his interest;⁴ but to make good to the assured all loss to property, gives the right to recover the full amount of loss.⁵ So, in case where an insured vendor has received part of his purchase-money before the loss,⁶ and the insurers have no claim either against the vendee, or rights against the property sold.⁷ And that the property still held by the mortgagee is ample security for the debt is of no avail to the insurers.⁸ And a commission merchant insuring goods, his own as well as in trust or on commission, the insurers agreeing to pay the "actual value" or "all damage," may recover the full amount of loss,⁹ but not unless they are so insured, if the policy require it.¹⁰ So

¹ *Security Ins. Co. v. Farrell*, Sup. Ct. Ill., 2 Ins. L. J. 302.

² *Sussex County Mut. Ins. Co. v. Woodruff*, 2 Dutch. (N. J.) 541.

³ *Foster v. Eq. Mut. Fire Ins. Co.*, 2 Gray (Mass.), 216; *Carpenter v. Washington Ins. Co.*, 16 Pet. (U. S.) 495. *Contra*, *Matthewson v. Western Ins. Co.*, 10 Lower Canada, 8.

⁴ *Sharswood, J.*, in *Thornton v. Enterprise Ins. Co.*, Sup. Ct. Penn., Legal Int., p. 170, June 14, 1872.

⁵ *Ins. Co. v. Updegraff*, 21 Penn. St. 513.

⁶ *Ins. Co. v. Updegraff*, 21 Penn. St. 513; *Boston and Salem Ice Co. v. Royal Ins. Co.*, 12 Allen (Mass.), 38.

⁷ *Ibid.*

⁸ *Kernochan v. New York Bowery Ins. Co.*, 5 Duer (N. Y. Superior Ct.), 1; s. c. affirmed, 17 N. Y. 428; *Rex v. Ins. Co.*, 2 Phila. Rep. (Penn.) 357.

⁹ *De Forest v. Fulton Fire Ins. Co.*, 1 Hall (N. Y. Superior Ct.), 84; *Lee v. Howard Fire Ins. Co.*, 11 Cush. (Mass.) 324.

¹⁰ *Brichta v. New York Lafayette Ins. Co.*, 2 ib. 374; *Keeley v. Ins. Co.*, 1 Phila. (Penn.) 175.

may a warehouseman insuring goods "in trust" recover the whole amount of loss on goods on storage.¹ A person having goods in his possession as consignee, or on commission, may insure them in his own name, and in the event of loss recover the full amount of the insurance, and, after satisfying his own claim, hold the balance as trustee for the owner.²

And the Court of Appeals of New York have recently held³ that, under a policy which insures goods "sold but not removed," the insured may recover for the benefit of the real owners, although the goods after the policy is issued are sold and delivered, and the title and right of possession have passed, if the location of the property has not been changed. Such a policy must intend that the risk taken should cover and adhere to the same property, after it had left the ownership of the insured named therein, and follow it while in the ownership of the vendee of the original owner, so long as it is not removed. And it is said that the law does not forbid that a policy should be so framed as that the insurance shall be inseparably attached to the property covered thereby, so that successive owners, during the continuance of the risk, shall become in turn the parties really insured.⁴ The survivor of a partnership dissolved by the death of one of the firm, can recover only the balance of the goods that belonged to the firm at the time of dissolution, and were in his hands as survivor at the time of the loss. Goods bought after the dissolution are not covered by the policy, unless by special agreement.⁵

§ 425. **Loss — Limitation by special Provision.** — By special provision of the policy or charter the amount of loss for which

¹ *Waters v. Monarch Fire and Life Ins. Co.*, 5 E. & B. 870; *Hough v. People's Ins. Co.*, 36 Md. 398; *London Railway Co. v. Glyn*, 1 E. & E. 652; *Siter v. Morris*, 13 Penn. St. 218.

² *Hough et al. v. People's Ins. Co.*, 36 Md. 398.

³ *Waring v. Indemnity Fire Ins. Co.*, 45 N. Y. 606.

⁴ Property held "in trust," within the meaning of a policy of insurance, unless specially defined, as was the case in *Ayres v. Hartford Ins. Co.*, 17 Iowa, 176, includes every thing in which the insured has only a qualified interest with the possession, while the ownership is in another. *Turner v. Stetts*, 28 Ala. 420; *Stillwell v. Staples*, 19 N. Y. 401.

⁵ *Wood v. Rutland Ins. Co.*, 31 Vt. (2 Shaw) 552.

the insurers are to be responsible may be, and often is, limited to a certain percentage or proportion of the value of the property insured. But in such case, if the policy be a valued one, that is, if the value of the property insured be fixed in the policy, that value will be conclusive.¹ Restriction is also sometimes made to a certain proportion of the value of the property at the time of the loss.² In such a case the value at the time of loss is open to inquiry though the policy be a valued one. The value at the time of insurance may be more or less than at the fire.³ And where the insurers were to pay "all loss or damage," not exceeding the sum insured, "the said loss or damage to be estimated according to the true and actual value of the property at the time the same shall happen, and to be paid at the rate of two-thirds of its actual cash value," it was held that the two clauses, construed together, meant that the insurers should pay two-thirds of the actual value of the property on hand at the time of the fire, not exceeding the sum insured.⁴ But when total losses were to be paid to the amount of two-thirds, and partial losses in full, and out of a stock of \$3,929 only about \$70 was saved, the court held that this insignificant salvage could not be considered as making the case one of partial loss, whereby the insured would be entitled to recover much more on partial than on total loss. Literally construed, the court said such must be the result. But such could not have been the intent of the parties.⁵ And under a restriction of recovery to two-thirds the value of the property a mortgagee may recover the full value of his interest if it does not exceed two-thirds of the value of the property insured.⁶ The fact that the property is

¹ *Borden v. Hingham Mut. Fire Ins. Co.*, 18 Pick. (Mass.) 523; *Fuller v. Boston Mut. Fire Ins. Co.*, 4 Met. (Mass.) 206; *Holmes v. Charlestown Mut. Ins. Co.*, 10 Met. (Mass.) 211; *Phillips v. Merrimack Mut. Ins. Co.*, 10 Cush. (Mass.) 350.

² *Brinley v. National Ins. Co.*, 11 Met. (Mass.) 195; *Huckins v. Peoples' Mut. Fire Ins. Co.*, 11 Fost. (N. H.) 238.

³ *Ibid.*; *Post v. Hampshire Mut. Fire Ins. Co.*, 12 Met. (Mass.) 555; *Egan v. Mut. Ins. Co.*, 5 Denio (N. Y.), 326; *Atwood v. Union Mut. Ins. Co.*, 8 Fost. (N. H.) 234.

⁴ *Ashland Mut. Fire Ins. Co. v. Housinger*, 10 Ohio St. 10.

⁵ *Singleton v. Boone County Ins. Co.*, 45 Mo. 250.

⁶ *Sanders v. Hillsborough Ins. Co.*, 44 N. H. 238.

overvalued, so that the insurers become liable for more than is permissible by their by-laws, will not excuse the company. The violation of the charter is no defence against the insured, there being no fraud.¹

§ 426. **Loss — Rebuilding — Transfer of Claim for Damages.** — As this rebuilding is but one mode of payment of the loss, the acceptance of an order to pay the loss to a person other than the assured does not deprive the insurers of their right to make the election. The acceptance is but an assignment of the claim of the insured, without in any way affecting the mode of payment. It is but a substitution of the assignee for the assured, and giving him the right to demand what the assured might have demanded.² And if the insurance be for a specific amount for a given period, and the cost of once repairing be less than the amount insured, the policy will remain good for the unexpended balance during the period covered by the policy.³ And it seems that but for the express limitation of the amount for which the insurers might become liable, they would have to replace as often as the property should be destroyed during the period of insurance.⁴ If goods are replaced, the insured is to be made good for his loss, and only that, and any arrangement between the parties for an extension of the time within which to replace or repair would control the original contract in this particular.⁵

§ 427. **Loss — Apportionment — Several Parcels.** — An agreement is sometimes inserted in the policy,⁶ and will sometimes be inferred from the circumstances of the case, for an apportionment of the loss and expenses of removal and protection of the goods during a fire; and in the absence of an express agreement, the proportion to be borne by each will be according to his interest. If, for example, the property is insured for one-half its value, each will bear one-half of such expense; if for three-quarters, then the insurer pays three-fourths and

¹ *Williams v. N. E. Mut. Ins. Co.*, 31 Me. 219; *Cumb. Val. Mut. Prot. Co. v. Schell*, 29 Penn. St. 31.

² *Tolman v. Manufacturers' Ins. Co.*, 1 Cush. (Mass.) 73.

³ *Trull v. Roxbury Mut. Ins. Co.*, 3 Cush. (Mass.) 263.

⁴ *Ibid.*

⁵ *Franklin Fire Ins. Co. v. Hamil*, 5 Md. 170.

⁶ *Peoria Fire and Mar. Ins. Co. v. Wilson*, 5 Minn. 53.

the insured one-fourth.¹ But insurance in a gross sum on property situated in different and distinct buildings covers all that may be destroyed in either building, to the amount of the insurance.² Where A. had deposited a large amount of cotton on storage with a warehouse company, and had effected, among others, an insurance against fire on two particular lots,—at one time on fifteen bales, and at another on thirteen bales,—and the warehouse containing the cotton of A., with that of others, was destroyed by fire, and a portion of the cotton was saved and sold at auction, by instruction of a committee of the insurance companies interested, the net proceeds of which sale were distributed, under the direction of the committee, among the assured ; in an action by A. to recover on his two policies, it was held that, in ascertaining the amount of loss or damage which the plaintiff should recover, the jury ought to deduct such sum as they might find from the evidence was the proportion due to twenty-eight bales in the distribution of the proceeds of sale of the cotton saved.³

§ 428. **Loss — Interest — Mode of Payment — Evidence.** — If there be no provision in the policy regulating the payment of the loss, interest will be reckoned from the date of the loss, or at least from the time of proof. But if a time is fixed for the payment, then interest will run from the time so fixed, unless, by trustee process or otherwise, the insurers be prevented from paying at that time.⁴ Payment of loss in gold, if agreed upon, is compulsory ; but this does not carry with it an obligation to pay dividends of profits.⁵ Where the insurance was on corn shipped from Chicago to Montreal, and the loss was payable to the Bank of Montreal, in funds current in the city of New York, it was held that in estimating the amount of the liability of the insurers, the premium in gold should not be allowed in favor of the insurers.⁶ The fact that the loss is in a foreign

¹ *Willis v. Boston Ins. Co.*, 6 Pick. (Mass.) 172.

² *Nicolet v. Ins. Co.*, 3 La. 371 ; *Rix v. Mut. Ins. Co.*, 20 N. H. 198.

³ *Hough v. People's Ins. Co.*, 36 Md. 398.

⁴ *Nevins v. Rockingham Fire Ins. Co.*, 5 Fost. (N. H.) 22 ; *Oriental Bank v. Fremont Ins. Co.*, 4 Met. (Mass.) 1.

⁵ *Luling v. Atlantic Mut. Ins. Co.*, 50 Barb. 520.

⁶ *Lamar Ins. Co. v. McGlashan*, 54 Ill. 513.

country does not add the expense of transmission of the amount due to the amount of the loss.¹ The market value at the time of the loss, and when the property is but partially destroyed and only damaged, the difference between the value of the property as it is and as it was, ascertained by a sale at auction, with notice to the parties interested, are data upon which to find the value.² And there is no right of abandonment, as in marine insurance.³ And it seems that the difference between a wholesale and a retail market value may be taken into account.⁴

§ 429. **Damages where Life Company improperly refuse to renew.** — If a life insurance company improperly refuse to accept the premiums, under a plea that the policy is void, an action may be maintained against them for damages; and it seems that the rule of damages would not be confined to the amount of the premiums paid with interest. If the person whose life is insured, though alive, should be laboring under a disease that must speedily result in death, the insurers ought not to be permitted to escape the payment of the amount for which the life was insured by putting an end to the contract.⁵

§ 430. **Loss — Payment — Rebuilding.** — As one means of protecting themselves against extravagant claims for losses, insurance companies frequently reserve the right to rebuild a building, or to replace the property destroyed, as one mode of arriving at the amount of loss which shall be paid. This right, however, is not one which inheres in the nature of the contract, and can only exist where there is a special stipulation therefor, and then is optional.⁶ If no time be fixed before which an election shall be made, it must be made within a reasonable time. And if it be provided that the company shall have a right to rebuild or replace within a reasonable time,

¹ *Burgess v. Alliance Ins. Co.*, 10 Allen (Mass.), 221.

² *Hoffman v. West. Mar. and Fire Ins. Co.*, 1 La. An. 216; *Henderson v. Same*, 10 Rob. (La.) 164.

³ *Ibid.*

⁴ *Hoffman v. Aetna Ins. Co.*, 1 Robt. (N. Y. Superior Ct.) 501.

⁵ *McKee v. Phoenix Ins. Co.*, 28 Mo. (7 Jones) 383.

⁶ *Wallace v. Ins. Co.*, 4 La. 289; *Commonwealth Ins. Co. v. Sennett*, 37 Penn. St. 205.

and where they elected so to do the insured should give security to pay one-third of the cost, and that "the insured shall have no right of action unless the insurers neglect for thirty days after the giving such security to proceed to rebuild," &c., the right of action is only suspended during the time within which the company has a right to rebuild; and if the rebuilding, duly commenced, has not been finished in a "reasonable time," an action may be brought,—the question of reasonable time being for the jury.¹ An election to repair, after fruitless negotiations to settle, and a month after the proofs of loss had been furnished, was held to have been within reasonable time.²

§ 431. **Loss — Rebuilding in Part — Damages.** — In *Brinley v. National Insurance Company*,³ the insurance company, under the right to rebuild, had erected a new building upon a somewhat different plan from the old one, which had been totally destroyed. And the question arose, on a suit to recover for the loss, what was the rule of damages? whether the insurers, as the plaintiff contended, should pay the actual cost of restoration, or whether, as the defendant contended, they should be allowed a deduction on account of the additional value of the new building. And hereupon the court (Wilde, J.) observed: —

"At the trial the defendants contended that as a new store of similar dimension and plan as the old one, a deduction ought to be made from the estimated cost of a new store, for the difference in value between the old store and the new one; analogous to the deduction of new for old in the adjustment of losses on marine policies. This claim of deduction was not sustained by the judge at the trial, and we are not aware of any authority or principle by which it can be supported. The rule in adjusting marine losses is arbitrary, and operates in some cases unjustly, giving to the insured more or less than a full indemnity, to which he is entitled by the policy, and to no more. The rule originated from the usages among merchants and underwriters, probably from the great difficulty of ascertaining the actual

¹ *Haskins v. Hamilton Mut. Ins. Co.*, 5 Gray (Mass.), 432. But see *ante*, § 423.

² *Sutherland v. Soc. of Sun Fire Office*, 14 Ct. of Sess. Cas. N. S. (Scotch) 775.

³ 11 Met. (Mass.) 195.

loss, without first repairing the damage done, or estimating the cost of repairs. The rule is applicable only to cases of a partial or a constructive total loss. It depends on usage, sanctioned by judicial decisions; and in some cases this rule of estimating the loss is expressly provided for by the terms of the policy. Such has been the stipulation in the marine policies in Boston for many years. But the rule has never been adapted to policies of insurance and other property against fire. The question then is, what is the rule of damages, if any there be, in cases like the present? The plaintiff's counsel contends that the actual loss is to be ascertained by the expense of restoring the property without any deduction for the difference of value between the new and old materials; and so the rule is laid down by Professor Greenleaf.¹ But the only adjudicated case he cites, which has any distinct bearing on the question, is that of *Vance v. Foster*,² in which Mr. Baron Pennefather laid down a very different rule. He says, as is reported in 3 Stevens,³ that 'the jury are to say what state of repair the machinery was in, what it would cost to replace it by new machinery, and how much better (if at all) the mill,' in which the machinery was placed, 'would be with the new machinery, than it was at the time of the fire; and the difference is to be deducted from the entire expense of placing there such new machinery.' This rule, in all cases where the cost of repairs is one of the elements by which the jury are to estimate the actual loss, seems to be founded on the principles of justice, as it will give to the assured a full indemnity and no more, to which he is entitled by the contract. But by the rule contended for by the plaintiff's counsel, the assured in most cases would recover more than an indemnity; and much more when the building insured is dilapidated and much out of repair. Such rule is not supported by any principle of justice, nor by the authority of any adjudged case. It is founded on an erroneous construction of the contract. It supposes that the insurers are bound to repair the building, or to pay the expenses of the repairs. But no such obligation is imposed on them by the policy.

¹ 2 Greenl. on Ev. § 407.

² 1 Irish Circuit Cases, 51.

³ N. P. 2084.

They have the privilege to make the requisite repairs, if they see fit, to protect themselves against the recovery of excessive damages, or for any other reason. But if they elect not to make the repairs, they are liable only to pay a fair indemnity for the loss. But whatever may be the rule when the building insured is partially injured by the peril insured against, it has no application to cases like the present, where the building is totally destroyed and is to be replaced by a new one. The rule of damages in cases on marine policies would not apply to a case where the ship had been totally destroyed. In the present case, the building was destroyed by fire, and a new building was erected upon a different plan; so that the cost of a new building could not be certainly ascertained. If the rule laid down in *Vance v. Foster* were applied, the jury must ascertain, by the estimates and opinions of witnesses, the amount of the expense of a new building, and they must estimate the value of the old building, in order to ascertain the difference, if any there be, between the new and the old. We can perceive no use in requiring this double estimate; for where the plaintiff is only entitled to recover the amount of the value of the building destroyed, the estimate of the cost of a new building is useless."

§ 432. **Loss — Rebuilding — Refusal to permit.** — If before the time expires within which the insurers may elect to rebuild or replace, the insured proceeds to remove the goods, so that the insured cannot determine the amount to be replaced, or to rebuild the building so that the insurers cannot rebuild without undoing what has been done, or availing themselves of what has been done, a court of equity will not interfere to restrain the insured. The fact of removal might be an important question in determining the question of damages, and might authorize them to find bad faith on the part of the insured as to the amount of his claim. And as in the other case the contract of insurance has substantially been converted into a building contract, the rule of damages under such contract will obtain.¹ If the election be not made, indemnity for the

¹ *New York Fire Ins. Co. v. Delavan*, 8 Paige (N. Y.), 418; *Beals v. Home Ins. Co.*, 36 N. Y. 522.

loss, and not the cost to replace, is the test of damages.¹ If, on the other hand, the insurance company elect to rebuild, and are proceeding to do it in an improper manner, a court of equity will not interfere to compel them to do it as they ought, but will leave the insured to his suit at law for damages, as if he had contracted with any third person.²

§ 433. **Loss — Partial rebuilding — Interference of public Authorities.** — If the insurers intending to perform their duty in good faith make repairs of substantial benefit, though not to the amount of the loss, in the estimate of damages they are to be charged with the difference between the value of the building as repaired, and what it would have been if it had been fully repaired.³ And such, it has been held in New York, would be the rule of damages where the insurers having commenced to rebuild desisted before the work was complete.⁴ If after reinstatement the work proves to have been imperfectly done, the insured will have his action against the insurers for not having duly reinstated the property.⁵ And if after he has commenced to rebuild he is interfered with by the public authorities and prevented from completing his work, or the building is ordered to be taken down as dangerous, even though its dangerous character was not attributable to the fire, the loss will be his. Nor will he be excused from paying the insured the entire amount of his loss, according to the agreement to rebuild or pay.⁶ So, if the consent of the public authorities to the rebuilding be required, and refused.⁷ But if the insured refuse permission to rebuild, he loses his right of action.⁸

§ 434. **Loss — Contribution.** — We have already seen that in

¹ *Com. Ins. Co. v. Sennett*, 37 Penn. St. 205.

² *Home Ins. Co. v. Thompson*, 1 Upper Canada Err. & App. 247.

³ *Parker v. Eagle Ins. Co.*, 9 Gray (Mass.), 152.

⁴ *Morrell v. Irving Fire Ins. Co.*, 33 N. Y. 429. In this case there were two policies by different companies, both containing the provision about the right to rebuild. It was held that both might be sued jointly or severally. And if one only was sued and compelled to pay, this one would have an action over against the other for contribution.

⁵ *Times Fire Ins. Co. v. Hawke*, 5 H. & N. (Exch.) 935.

⁶ *Brown v. Royal Ins. Co.*, 1 E. & E. (Q. B.) 853.

⁷ *Brady v. North Western Ins. Co.*, 11 Mich. 425.

⁸ *Beals v. Home Ins. Co.*, 36 Barb. (N. Y.) 611.

cases of double insurance, that is, where several policies in different offices insure the same party upon the same subject-matter against the same risk, as there can be but one loss and one indemnity, the several offices, as between themselves, must contribute proportionably to the loss, though each is liable to the insured for the entire loss, unless there is a special agreement that each shall be liable only for its proportional part. The several insurers are regarded as if they were one,¹ each standing as co-surety with the other, according to the amount which he undertakes, just as if all had underwritten the same policy. To avoid circuitry of action the *pro rata* limitation was introduced.² And if an office having in its policy the provision for the proportional liability pay more than its share, it can have no remedy for contribution against the other offices, since its own negligence can give it no right of action against others.³ It may, however, have a remedy against the assured.⁴

§ 435. Loss — Contribution — Double Insurance — Identity of Risk. — In the case of *Howard Insurance Company v. Scribner*,⁵ it was held that double insurance occurred only when the subsequent insurance was upon the same precise property as that covered by the first; and that insurance in one policy on fixtures for \$1,000 and on stock for \$3,000, and in another policy for \$5,000 on stock and fixtures as one parcel, was not a double insurance. As a consequence, the rule of apportionment in case of other insurance did not apply, and recovery might be had on the first policy without regard to the second. But this doctrine has been repudiated in a very recent case,⁶ and the rule in *Blake v. Exchange Mutual Insurance Company*,⁷ at least as applicable to a case of total loss, adopted. In considering the case the court said: —

¹ *Ante*, § 13. See also, in addition to the authorities therein cited, *Harris v. Prot. Ins. Co.*, Wright (Ohio), 548; *Hough v. People's Ins. Co.*, 36 Md. 398; *Mechanics' Fire Ins. Co. v. Nichols*, 1 Harr. (N. J.) 410.

² *Howard Ins. Co. v. Scribner*, 5 Hill (N. Y.), 298.

³ *Lucas v. Jefferson Ins. Co.*, 6 Cowen (N. Y.), 635.

⁴ *Fitzsimmons v. City Fire Ins. Co.*, 18 Wis. 234.

⁵ 5 Hill (N. Y.), 298.

⁶ *Ogden v. East River Ins. Co.*, N. Y. Ct. of App., Dec. 1872, 2 Ins. L. J. 135.

⁷ 12 Gray (Mass.), 265.

“The clause now usual in policies of insurance which provides for an apportionment of the loss, in case of other insurance on the property, is a part of the contract, and must receive a reasonable construction. We have no right to engraft upon it the rules governing suits for contribution among insurers, or to restrict its operation to cases where such suits could be maintained, but must look at the language of the clause itself, and construe it as we would any other stipulation between the insurer and the insured.

“We cannot adopt the view taken of this clause in the case of *Howard Insurance Company v. Scribner*,¹ where it was held, in analogy to the rule in actions for contribution, that where a specific parcel of property is insured by one policy, and the same property is covered by another policy, which also includes other property, the latter policy is to be thrown wholly out of view, and does not constitute other insurance within the meaning of the clause; in either case, the whole sum insured by the more comprehensive policy is to be considered as so much additional insurance upon the parcel separately insured.

“Where several parcels of property are insured together for an entire sum, it is impossible to say, as to either of the parcels, that there is no insurance upon it, neither is it reasonable to assume that any of the parcels is insured for more than its value when the whole sum insured is less than the aggregate value of all the parcels covered by the policy. The difficulty lies in determining what part of the whole sum insured is to be deemed applicable to either parcel, when the policy itself makes no separation.

“If the entire property is destroyed, as in this case, the rule laid down in *2 Phillips on Insurance*,² and in *Blake v. Exchange Mutual Insurance Company*,³ carries out the intent of the clause, and works entire equity between the insurers and the insured, as well as between the several insurers. That rule is, in substance, that for the purpose of apportioning the loss, in case of over insurance, where several parcels are

¹ 5 Hill, 298.

² Page 36, No. 1263 a.

³ 12 Gray, 265.

insured together by one policy for an entire sum, and one of the parcels is insured separately by another policy, the sum insured by the first-mentioned policy is to be distributed among the several parcels in the proportion which the sum insured by the policy bears to the total value of all the parcels. Thus, in round numbers, the sum insured in this case by the policies other than the defendants' on the property as an entirety, was \$47,000. The total value of the property covered by these policies was \$88,000. In case of a total loss, each parcel should be deemed insured thereby for $\frac{47}{88}$ of its value. The parcel separately insured by the defendant was worth \$16,000, and was insured by the defendant for \$3,000, which was equal to $\frac{3}{16}$ of its value. It is manifest that there was no over insurance, and that consequently there is no occasion for any apportionment."

And substantially this rule has been followed in Kentucky¹ and in Missouri.² In another case in Massachusetts, a policy was taken for \$3,000, "additional to \$9,000 insured in other offices, and \$8,000 to be insured in other offices." There was in fact at the time of loss but \$11,000 additional insurance. It was held that the insurers must pay in proportion to the amount of actual, and not of contemplated, insurance.³

§ 436. *Loss — Contribution — Floating Policy — Specific Insurance.* — But under a general or floating policy, intended to cover property which cannot well be covered by specific insurance, from the circumstance that it is changing in quantity or location, as when the policy, as a "condition of average," provides that if the merchandise should at the time of any fire be insured by any specific insurance, then the policy should not extend to cover such merchandise, excepting only so far as relates to any excess of value beyond the amount of the specific insurance, which excess, however, the policy will protect, no claim can be made under the floating policy, if the

¹ *Cronine v. Ken. and Lon. Mut. Ins. Co.*, 15 B. Mon. (Ky.) 432.

² *Angelrodt v. Delaware Ins. Co.*, 31 Mo. 593.

³ *Richmondville v. Home Mut. Ins. Co.*, 14 Gray (Mass.), 450. See also *Haley v. Dorchester Mut. Ins. Co.*, 1 Allen (Mass.), 536.

specific insurance exceeds the amount of the value of the goods insured by it and destroyed.¹

In the following case certain policies were held to be specific: Between the 5th of February, 1870, and the 15th of July, 1870, both days inclusive, the appellants deposited on storage in a certain warehouse, occupied by the Baltimore Warehouse Company, sundry lots of cotton in bales. For each lot deposited the appellants received from the warehouse company a receipt, warrant, or certificate, which specified the number of bales, and the date of the deposit, and also the mark on the bales, — the letters X. Q. being marked on each bale so deposited. These receipts or certificates were all numbered. On the 20th of June, 1870, the appellants deposited fifteen bales and took a receipt therefor, numbered 1221, and on the following day a policy of insurance was taken out to cover the particular number of bales thus deposited. On the 27th of June the appellants deposited thirteen bales, and took a like receipt therefor, numbered 1238, and on the same day effected an insurance for the particular number of bales thus deposited. On the face of each policy the loss, if any, was made payable to the warehouse company; and the policies and receipts were delivered to the warehouse company to secure advances made by it. On the policy on the fifteen bales there was indorsed in pencil in figures the number 1221, corresponding with the number of the warehouse receipt given therefor; and on the policy on the thirteen bales there was indorsed, also in pencil, 1238, corresponding with the number of the receipt for the cotton. At the time of each deposit the depositor reserved a sample of the particular lot deposited. The warehouse company held at the same time a general policy on goods held by them in trust. On these facts it was held that the policies were specific and not general; that each covered, and was intended to cover, the specific number of bales in each deposit, and the insurance on which was effected at the time of the deposit, — the policy of the 21st of June, 1870, covering only the fifteen bales deposited on the day previous, and the

¹ *Fairchild v. Liv. and Lon. Fire and Life Ins. Co.*, N. Y. Com. of App., Sept. 1872, 2 Ins. L. J. 112.

policy of the 27th of June the thirteen bales deposited on that day.¹

§ 437. **Loss — Contribution — Double Insurance — Identity of Risk.**— A warehouse company which received goods on storage, and gave receipts therefor, effected insurance in one company for \$10,000, against loss by fire for a year, "on merchandise generally held by them or in trust," contained in a particular warehouse. They also took out a policy from another company for \$20,000, "on merchandise, their own, or held by them in trust, or in which they held an interest or liability." The plaintiff, on the 20th and 27th days of June respectively of the year covered by the above policies, deposited cotton with the warehouse company, and took receipts; and in each case took out policies from the defendants upon the respective lots of cotton deposited. Under these policies issued to the plaintiff, the loss, if any, was made payable to the warehouse company, with whom the plaintiff had other large amounts of cotton stored. In the policies to the plaintiff, as well as in those to the warehouse company, it was stipulated that in case of loss the assured should not be entitled to recover on such policy any greater proportion of the loss or damage sustained to the subject insured, than the amount thereby insured. July 18, 1870, and during the currency of all the policies, the warehouse was burned, and some of the bales of cotton destroyed, and others only damaged. Upon these facts it was held that the plaintiff's policies being made payable to the warehouse company inured to the benefit of the company, and were to be considered as in favor of the same assured on the same interest, in the same subject, and against the same risks as the policies which were issued directly to the company; that with the latter policies they constituted a double insurance, and the companies therefore issuing the policies were bound to contribute their respective proportions of the loss.² But a mortgagee who insures his interest subject to the usual provision for an apportionment of the amount to be paid in case of loss, is not to have the amount recoverable by him reduced by the fact

¹ *Hough v. People's Ins. Co.*, 36 Md. 398.

² *Ibid.*

that a subsequent mortgagee has insured his interest in another company. The interests are separate and distinct.¹

§ 438. **Loss — Contribution — Restricted Liability.** — Insurers who restrict their liability to a certain proportion of the loss, will have the benefit of the restriction in case they are called upon for contribution. Thus where the restriction is to two-thirds of the value of the property, and there is other insurance, and the whole loss is more than the two-thirds, the first insurers will be liable only for such a proportion of the loss, within the two-thirds, as the amount of their insurance bears to the amount of the second insurance.² If the first insurance be three-fourths on \$2,000, and other insurance exist to the amount of \$3,000, in case of loss the first insurers will be liable only for two-fifths of three-fourths of the value of the property at the time of the loss.³ The provisions of the policy in the case just cited were, that “when property is insured by this company solely, three-fourths only of the value will be taken, and in case of loss the company will be liable to pay only three-fourths of the value at the time of the loss,” and that “in case of loss or damage of property upon which double insurance exists, the company shall be liable to pay only such proportion thereof as the sum insured by this company bears to the whole amount insured thereon, — such amount not to exceed three-fourths of the actual value at the time of the loss;” and their effect was thus stated by Bigelow, J.: —

“The defendants did not assume a liability in case of the existence of other insurance on the property, to be ascertained solely by calculating the proportion which the sum insured by them bore to the whole amount insured on the property. The basis of calculation was in all cases to be the value of the property insured, after deducting one-fourth of such value. Of this sum the defendants were to pay such proportion as the sum insured by the policy issued by them should bear to the whole sum insured by all the policies existing on the property at the time of the loss. In other words, the defendants were to be liable only for their proportion of three-fourths of

¹ Fox v. Phoenix Ins. Co., 52 Me. 333.

² Goodall v. N. E. Mut. Fire Ins. Co., 5 Fost. (N. H.) 169.

³ Haley v. Dorchester Mut. Fire Ins. Co., 12 Gray (Mass.), 545.

the value of the property insured ; and this proportion was to be ascertained by calculating the ratio which the sum insured in the policy declared on bore to the whole sum insured by all the policies existing on the property. Thus, if the whole property at the time of the loss amounted to ten thousand dollars, the sum on which the liability of the defendants must be reckoned would be three-fourths of ten thousand, or seven thousand five hundred dollars ; and of this last sum the defendants would be held to pay only the proportion which the amount insured by them, viz., two thousand dollars, bore to the whole sum insured, viz., five thousand ; or two-fifths of seven thousand five hundred dollars, which would be three thousand dollars. But as this last sum exceeds the whole amount insured by the defendants, it would be cut down to that amount, and the plaintiff could recover only two thousand dollars."

§ 439. **Loss — Contribution — Reinsurance — Void Policy.** — If a policy of reinsurance provide that "in case there were other insurance, prior or subsequent, the reinsured should be entitled to recover only a proportionate part;" the other insurance spoken of refers to other reinsurance, and unless this exist the reinsurer can claim no proportionate reduction.¹ And so, if for any cause the other policies be invalid, there can be no contribution, as there is no other insurance.²

§ 440. **Loss — Life Insurance — Contribution — Double Insurance.** — Generally, in life insurance, the questions of double insurance do not arise, as there is no fixed value to the life, and the person in each case is to pay a fixed sum, without regard to other insurance. But where the insurable interest has an ascertainable value the question may arise, as where two policies are taken out in different offices, by a creditor, on the life of a debtor, and for the same debt. Then only the value of the interest can be recovered, and the amount recovered on the first policy is to be deducted from the amount payable on the second.³

¹ *Mut. Safety Ins. Co. v. Hone*, 2 Comst. (N. Y.) 235.

² *Hygum v. Ætna Ins. Co.*, 11 Iowa, 21.

³ *Hebdon v. West*, 3 Best & Smith, 580; s. c. E. C. L. 113, 917.

§ 441. **Loss — Alternative Damages.** — Under a policy of insurance in the sum of two thousand dollars against loss of life from accidental injuries, occasioning death within ninety days from the accident, and in the sum of ten dollars a week, for a period not exceeding twenty-six weeks, against personal injury “for any single accident by which the insured shall sustain any personal injury which shall not be fatal,” the weekly sum is due for injury by an accident which does not occasion death within ninety days, although it ultimately proves fatal. The two provisions are to be construed together, and the intent is that if an injury happens, within the meaning of the policy, it is insured against, as coming under one class or the other. If it were otherwise construed, an injury which should not prove fatal within ninety days would furnish no ground of action till it should be made to appear that it would never prove fatal,—a construction which would render the insurance nugatory in such cases.¹

§ 442. **Loss — Payment by Mistake — Recovery back.** — The holder of a life policy, on proof of the death of the insured, recovered the amount payable in such an event. It was subsequently ascertained, however, that the insured was not dead; and thereupon the insurers brought suit to recover back the money so paid, as obtained by misrepresentation: and it was held that it appearing there was no want of good faith on the part of the holder of the policy, the insurers might recover upon condition, and only upon condition, of redelivery of the policy as a subsisting and valid contract.²

§ 443. **Loss — Fraudulent Overvaluation.** — Fraudulent overvaluation of goods destroyed is a complete defence to the claim for indemnity, but a mistaken or exaggerated overvaluation, not fraudulent, does not deprive the insured of the right to recover an amount equal to the actual loss.³

§ 444. **Loss — Evidence of Payment.** — Where the policy has been lost, and the court decrees the payment of the loss, the insurance company has no right to demand a bond of indem-

¹ *Perry v. Prov. Ins. Co.*, 103 Mass. 242.

² *North Brit. Ins. Co. v. Stewart*, 9 Ct. of Sess. Cas. 3d series, 534.

³ *Chapman v. Pote*, 22 L. T. 306. At *Nisi Prius*, Cockburn, C. J.

nity before payment. The decree of the court is the company's sufficient protection.¹

§ 445. **Loss — Nominal and real Claimants.** — The nominal and real claimants are frequently not the same. Owing to the form of the contract it often happens that one party is to bring suit to recover the loss, while after recovery it is to be paid over to others. The questions often therefore arise, Who is to sue? and who is to receive ultimately the amount recovered? The name of the insured may not be stated in the policy, as it need not be. And if the person for whose benefit the policy is made does not therein appear, or if the designation is applicable to several persons, or if the description of the insured is imperfect or ambiguous, so that it cannot be understood without explanation, — extrinsic evidence may be resorted to, to show for whom the insurance was intended; and those will be included within the benefits of the policy who shall appear to have been within the intention of the parties. An insurance, for example, is effected upon "the estate of Daniel Ross," and it not being apparent who were intended to be included within that designation, evidence is admissible to show that both parties understood that the insurance was for the benefit of the widow and heirs of Ross. That the personal estate is represented by the administrator, and therefore the administrator was the person designated, is too strict a construction. The expression is rather used to designate the whole estate left by the deceased and held by those who have the legal title.²

§ 446. The general rule applicable to personal contracts is that, if assigned, the action for a breach must be brought in the name of the assignor, except where the defendant has promised the assignee to respond to him. But a consent to the assignment is generally held to be the equivalent of this promise.³ And so, if the policy is made "payable, in case of

¹ *England v. Tredegar*, Law Reports, Eq. Cases, 1, 344.

² *Clinton v. Hope Ins. Co.*, 45 N. Y. 454; *Matthews v. Queen City Ins. Co.*, 2 Cincinnati Superior Court Reporter, 109.

³ *Kingsley v. New England Mut. Ins. Co.*, 8 Cush. (Mass.) 393; *Philips v. Merrimack Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 350. *Contra*, *Jessel v. Williamsburgh Ins. Co.*, 3 Hill (N. Y.), 88.

loss," to a third party.¹ So on life policies the suit may be brought in the name of the beneficiary; and this is so notwithstanding the party who effects the insurance is styled a trustee, it appearing that he is merely an agent.²

§ 447. **Loss—Who may claim.**—And upon an order, indorsed on the policy, to pay in case of loss to a third party, accepted by the company, or assented to by them, the payee may maintain an action in his own name, on setting out the facts in his declaration.³ Such an assent, however, means only that the insurers will discharge the obligations of the contract to the assignee instead of the assignor, and if they, by the terms of the contract, had a right to replace the property, an assent to an order to "pay the loss" means only that they shall discharge the contract as agreed, and does not operate to change the terms of the contract so as to cut them off from the right to replace, and compel them to pay the money to the assignee. To pay is to discharge an obligation by a performance according to its terms or requirements. If the obligation be for money, the payment is made in money; if for merchandise or labor, a delivery of merchandise or performance of the labor is payment; or if for the erection of a building, performance according to the terms of the contract.⁴ In New Hampshire, however, in mutual companies, the action must be brought in the name of the assignor, although the assignment is assented to, and the policy is made payable in case of loss to a third party, unless by giving a new premium note the assignee becomes substituted for the insured, and a member of the company, when the action must be brought in the name of the latter.⁵

¹ *Motley v. Manufacturers' Ins. Co.*, 29 Me. 337; *Ripley v. Ætna Fire Ins. Co.*, 29 Barb. (N. Y.) 552; *Frink v. Hampden Ins. Co.*, 1 Abb. (N. Y.) Pr. Cas. N. S. 343; *Ennis v. Harmony Fire Ins. Co.*, 3 Bosw. (N. Y. Superior Ct.) 516.

² *Hillyard v. Mut. Ben. Life Ins. Co.*, Sup. Ct. N. J. 1872, 2 Ins. L. J. 137.

³ *Barrett v. Union Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 175; *Lowell v. Middlesex Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 127; *Loring v. Manufacturers' Ins. Co.*, 8 Gray (Mass.), 28.

⁴ *Tolman v. Manufacturers' Ins. Co.*, 1 Cush. (Mass.) 73.

⁵ *Nevins v. Rockingham Mut. Fire Ins. Co.*, 5 Fost. (N. H.) 22; *Folsom v. Belknap County Mut. Fire Ins. Co.*, 10 Fost. (N. H.) 231; *Rollins v. Columbia Fire Ins. Co.*, 5 Fost. (N. H.) 200; *Blanchard v. Atlantic Mut. Fire Ins. Co.*, 33 N. H. 9.

And in New York.¹ And he may sue, in New Jersey, even on a parol agreement to pay the premium, the assignee being the mortgagee.² And in Maine.³ And perhaps in Pennsylvania.⁴ But as such consent gives to the assignee no legal interest in the property, which remains still in the assignor, the latter may bring an action in his own name, without alleging any authority from the assignee.⁵ The assent, after action brought, will be sufficient, though in that case the plaintiff will be entitled to no costs.⁶

§ 448. **Loss—Nominal and real Claimants—Agent—Broker.**—If the policy be issued in the name of an agent of several parties, the suit may be in the name of the agent.⁷ So, if issued to a broker "for whom it may concern."⁸ Where the policy is assigned as collateral security, with the consent of the company, but the assignee has no interest in the property, both cannot join, and the assignee must sue.⁹ But a parol agreement by the company to recognize the rights of another under the policy, and to affirm its validity as to any particular property or interest, will give to that party a right of action on the policy in his own name.¹⁰ And there are many cases where a resort to equity will be necessary. As where A., the insured, sells to B., who takes in a partner, C., the insurers consenting that the policy shall remain in part to C. and in part to B. and C., the policy never having been assigned, nor any interest therein, to C.¹¹ An administrator has no interest in real estate insured, and cannot sue to recover for a loss occurring after his appointment.¹² In Iowa, the real party in interest

¹ *Mann v. Herkimer County Mut. Ins. Co.*, 4 Hill (N. Y.), 187.

² *Flannagan v. Camden Mut. Ins. Co.*, 1 Dutch. (N. J.) 506.

³ *Stimpson v. Monmouth Mut. Fire Ins. Co.*, 47 Me. 379.

⁴ *Lycoming County Mut. Ins. Co. v. Schreffler*, 44 Penn. St. 269.

⁵ *Ketchum v. Prot. Ins. Co.*, 1 Allen (New Brunswick), 136.

⁶ *Jackson v. Farmers' Mut. Fire Ins. Co.*, 5 Gray (Mass.), 52.

⁷ *Barnes v. Mut. Fire Ins. Co.*, 45 N. H. 21; *Goodall v. New England Mut. Fire Ins. Co.*, 5 Fost. (N. H.) 22.

⁸ *Prot. Ins. Co. v. Wilson*, 6 Ohio St. 553.

⁹ *Peabody v. Wash. County Mut. Ins. Co.*, 20 Barb. (N. Y.) 339; *Frink v. Hampden Ins. Co.*, 31 How. (N. Y.) 30.

¹⁰ *Wood v. Rutland Mut. Fire Ins. Co.*, 31 Vt. 552.

¹¹ *Bodle v. Chenango County Mut. Ins. Co.*, 1 Comst. (N. Y.) 53.

¹² *Beach v. Bowery Fire Ins. Co.*, 8 Abb. Pr. (N. Y.) 261.

must bring the action ; and although an assignment be prohibited, by special provision of the Code, the assignee may sue, subject to all rights of set-off and defence, legal or equitable, which might have been made against the assignor.¹

§ 449. **Loss — Mortgagor and Mortgagee — Debtor and Creditor.** — Where a mortgagee insures his own interest, without any agreement between him and the mortgagor, the latter has no claim to have any portion of the loss recovered applied to the discharge of his debt. But otherwise if the mortgagee effects the insurance at the request and cost, and for the benefit of, the mortgagor.² Where the mortgagor insures, payable to the mortgagee in case of loss, the mortgagor cannot sue alone unless the mortgagee has been paid, which he must allege. If not paid, both may join.³ Where a creditor, with the knowledge and consent of the debtor, in account with the latter, charges him with the premiums paid for insurance on the debtor's life, he will be held to account for any surplus, over an amount necessary to pay the debt, received from the insurers. But not unless the facts show an agreement that the creditor is to insure, and the debtor pay the premium.⁴ And yet if the debtor pays off the debt during his life, he will not be entitled to demand from his creditor a policy purchased and to be kept up at his expense as a security for his creditor,⁵ — a conclusion to which the Vice-Chancellor (Stuart) said, in the later case, he came to with dissatisfaction and reluctance, because he felt himself bound by the earlier case.

§ 450. **Loss — Vendor and Vendee — Lessor and Lessee.** — The assignee of a vendor's interest, in a contract for the sale of real estate, which contract provides for an insurance by the vendee for the benefit of the vendor, is equitably entitled to the moneys due upon an insurance effected by such vendee in his own name ; and where the insurer has notice of such assign-

¹ *Mershon v. National Ins. Co.*, 34 Iowa, 87.

² *Concord Mut. Fire Ins. Co. v. Woodbury*, 45 Me. 447.

³ *Ennis v. Harmony Fire Ins. Co.*, 3 Bosw. (N. Y. Superior Ct.) 516.

⁴ *Bruce v. Gardner*, 22 Law Times, n. s. 592 ; per Lord Chancellor Hathery, overruling Vice-Chancellor James, in same case, 20 L. T. n. s. 1002.

⁵ *Gotlieb v. Cranch*, 4 De G., M. & G. 440 ; *Knox v. Turner*, 21 Law Times, n. s. 701.

ment, he is liable to such assignee, to the extent of his interest, although he has, after such notice, actually paid the loss to the vendee. And the fact that the policy is by its terms unassignable, without the consent of the office, is immaterial, since the liability is not founded upon an assignment of the policy, but upon the equitable lien of the vendor's assignee, the insurer being, after notice, a trustee of the fund for the assignor's benefit.¹ Where a tenant agrees to insure for the benefit of his landlord, the latter deducting one-half of the premium from the rent as it accrued, it was held that the landlord was entitled to the whole of the insurance money.²

§ 451. **Loss — Insurance by Wife on her own Life for Benefit of Husband.** — The proceeds of policies taken out by a wife, on which the premiums were paid by her out of her funds, on her own life, and for his benefit, before his bankruptcy, do not, on her decease, inure to the benefit of the bankrupt's estate.³

§ 452. **Loss — Feme sole under Contract of Marriage.** — In *Chisholm v. National Capital Life Insurance Company*,⁴ the plaintiff, who was the betrothed of one Clark, and for whom he had taken out a policy on his life, payable to her, was allowed to recover. The insurable interest at the inception of the contract was sufficient, if any were necessary, of which the court intimated a doubt, in the absence of evidence tending to show the contract was a wagering one, or against public policy. The plaintiff had an interest in the life of Clark, as a valid contract of marriage was subsisting between them. Had he lived and violated the contract, she would have had her action for damages; had he observed and kept the contract, then as his wife she would have been entitled to support.⁵

§ 453. **Insurers — Subrogation — Remedy over of Insurer.** — The insurer does not, at common law, acquire by the payment

¹ *Cromwell v. Brooklyn Fire Ins. Co.*, 44 N. Y. (Com. of App.) 42.

² *Duke of Hamilton's Trs. v. Flemming*, 9 Cas. in Ct. of Sess., 3d series (Scotch), 329.

³ *Murrin, Petr. In the Matter of Owen et al.*, in bankruptcy, U. S. C. Ct., Eastern District of Mo., Mar. 1873. *Coram*, Treat, J., 2 Ins. L. J. 524.

⁴ Supreme Ct. Mo., 2 Ins. L. J. 461.

⁵ This case properly belongs to the chapter on Insurable Interest, but did not come to the knowledge of the author till that chapter was printed.

of a loss a right in his own name to recover damages against the party by whose negligence and fraud the loss is caused.¹ One who wilfully sets fire to a building, or negligently destroys a life, and thus give rise to claims against the insurers for losses which they have been obliged to pay, is not liable over to the insurers for the loss thus occasioned, unless there be in some way privity of contract between him and the insurers, or there is due from him towards them some special duty. If no special right of theirs as against him, and no duty towards them is violated, they have no claim. The injury is too remote and indirect to constitute an injury in a legal sense. The man who kills another, violates the rights of the deceased and his general duty to society; but his misconduct affords to the creditor of the deceased no legal ground of action.² In the case just cited from Connecticut, where an insurance company had paid a loss for a death caused by the negligence of the railroad company, the court dismissed the action on two grounds: first, on the ground that at common law a party is not liable *civilliter* for the destruction of human life, and second, on the special ground that there is no such relationship between the parties as to lay a foundation for such an action. So much of the opinion as is devoted to this latter ground we give entire, in the words of Storrs, J.:³—

“The defendants, a railroad company, are charged with having negligently occasioned the death of one Dr. Beach, by which event the plaintiffs, a life insurance company, have been compelled to pay to his representatives the amount of an insurance effected upon his life, of which amount a recovery is sought in this action. A plea in bar sets forth a payment to the administratrix of the deceased of the damages for which the defendant's negligence had rendered them legally liable, and also a discharge by her. This plea and the demurrer thereto require no examination, as they are immaterial in the view which we take of the declaration.

¹ London Ass. Co. v. Sainsbury, 3 Doug. 245.

² Rockingham Mut. Fire Ins. Co. v. Boshier, 39 Me. 253; Conn. Mut. Life Ins. Co. v. New York & New Haven R. R. Co., 25 Conn. 265; Anthony v. Slaid, 11 Met. (Mass.) 290.

³ The whole opinion is very able and interesting, and well worthy of perusal.

"It is clear, from the declaration, that a pecuniary injury has been sustained by the plaintiffs in consequence of the unlawful conduct of the defendants. If the injury thus set forth be actionable, or an injury in a legal sense, there must be a recovery. But we are of the opinion that the wrong complained of is not the proper subject of a suit at law, both for reasons appertaining to the peculiar nature of the injury and to the manner in which its consequences are brought home to the party claiming redress.

"The other branch of our inquiry, relating to the manner in which the injury complained of was brought home to the party claiming to have suffered by it, concerns principles of great practical interest, and novel in their present application. The plaintiffs sustain no relation to the authors of the wrong other than that of mere contractors with the party injured, and their contract liability is the medium through which the injury is brought home to them. They justly say that their loss is in fact distinctly traceable and solely due to the misconduct of the defendants; that the death of Dr. Beach, caused by the defendants, in a legal sense determined the only contingency out of which their liability grew, and brought upon them the consequences of that liability which, through the defendant's unlawful acts, had now become fixed. Still the question remains, notwithstanding this precise exhibition of cause and effect, whether these consequences, of which the deceased was primarily the subject, and which affected the plaintiffs only because they had put themselves into the position of contractors with him, were in a legal view brought home to the plaintiffs, directly or indirectly. The completeness of the proof of connection between the acts of the defendants and the loss of the plaintiffs does not vary, although it may tend to confuse the aspects of the case. The single question is whether a plaintiff can successfully claim a legal injury to himself from another, because the latter has injured a third person in such a manner that the plaintiffs' contract liabilities are thereby affected. An individual slanders a merchant and ruins his business; is the wrong-doer liable to all the persons, who, in consequence of their relations by contract to the bankrupt, can

be clearly shown to have been damuified by the bankruptcy? Can a fire insurance company, who have been subjected to loss by the burning of a building, resort to the responsible author of the injury, who had no design of affecting their interest, in their own name and right? Such are the complications of human affairs, so endless and far-reaching the mutual promises of man to man, in business and in matters of money and property, that rarely is a death produced by human agency which does not affect the pecuniary interest of those to whom the deceased was bound by contract. To open the door of legal redress to wrongs received through the mere voluntary and factitious relation of a contractor with the immediate subject of the injury, would be to encourage collusion and extravagant contracts between men, by which the death of either, through the involuntary default of others, might be made a source of splendid profits to the other, and would also invite a system of litigation more portentous than our jurisprudence has yet known. So self-evident is the principle that an injury thus suffered is indirectly brought home to the party seeking compensation for it, that courts have rarely been called upon to promulgate such a doctrine. The case, however, of *Anthony v. Slaid*,¹ referred to at the bar, is in point. A contractor for the support of paupers had been subjected to extra expense, by means of a beating which one of those paupers had received, and he sought from the assailant a recovery of the expenditure. But the court held that the damage was remote and indirect, having been sustained not by means of any natural or legal relation between the plaintiff and the party injured, but by means of the special contract by which he had undertaken to support the town paupers.

“The case, however, would present a different aspect, if, by virtue of the contract between the railroad company and the deceased, a direct relation was established between the former and the insurers. If the contract for the transportation of Dr. Beach safely, either in its terms or through its necessary legal incidents, or by fair inference as to the intent of the parties, devolved upon the railroad company a duty towards the pres-

¹ 11 Met. 290.

ent plaintiffs, the latter might sue for a violation of that duty. An obligation thus imposed will not always require a suit for its breach to be brought by a party to the contract ; an independent right of action resides in the party to whom the duty was to be performed. In this respect there is no difference between an obligation imposed by law and by contract. Where the duty of keeping a highway is lodged in a certain quarter by statute, the way is to be kept in repair for the public, for everybody ; and when any person is injured by its defects, the breach of duty is to him, and he has an action for the violation of his right. If a stage-coach proprietor agrees with a master to carry his servant, and injures the latter on the road, he is liable directly to the servant ; for although undertaken at the request of and by agreement with another, the duty was directly to the party injured.¹ But it is evident that the present case cannot be brought within the principle of such decisions. It would be unfair to argue that when two parties make a contract, they design to provide for an obligation to any other persons than themselves and those named expressly therein, or to such as are naturally within the direct scope of the duties and obligations prescribed by the agreement. On this point it is enough to say that when an agreement is entered into, neither party contemplates the requirement from the other of a duty towards all the persons to whom he may have a relation by numberless private contracts, and who may therefore be affected by the breach of the other's undertakings. We cannot find that any public law charged the present defendants with any duty to the plaintiffs, regarding Dr. Beach's life, nor can we see that Dr. Beach exacted, either expressly or by reasonable intendment, any obligation from the defendants towards the insurers of his life, when he contracted for his transportation to New York. Had the life of Dr. Beach been taken with intent to injure the plaintiffs, through their contract liability, a different question would arise, inasmuch as every man owes a duty to every other not intentionally to injure him.

“ We decide that in the absence of any privity of contract between the plaintiff and defendants, and of any direct obliga-

¹ Longmeid et ux. v. Holliday, 6 Eng. L. & Eq. 563.

tion of the latter to the former growing out of the contract or relation between the insured and the defendants, the loss of the plaintiffs, although due to the acts of the railroad company, being brought home to the insurers only through their artificial relation of contractors with the party who was the immediate subject of the wrong done by the railroad company, was a remote and indirect consequence of the misconduct of the defendants, and not actionable.

“Since the determination of this case, we have observed a decision, recently made in Maine,¹ fully confirming the legal theory which we have advanced. The suit was brought against a party who had wilfully fired a store, by the insurance company, who had paid the consequent loss, and in their own name. The court dismissed the action on demurrer, taking the same view of the common-law doctrine which we have expressed, relative to the indirect and remote manner in which the interests of the insurer were prejudiced by the misconduct of the wrong-doer. The cases in which insurers have been permitted to recover against the authors of those losses are not in contravention of these principles. They have recovered, not by color of their own legal right, but under a general doctrine of equity jurisprudence, commonly known as the doctrine of subrogation, applicable to all cases wherein a party who has indemnified another in pursuance of his obligation so to do, succeeds to and is entitled to a cession of all the means of redress held by the party indemnified against the party who has occasioned the loss. In some instances the doctrine has been carried so far that an insurer has been permitted to recover from the insured such compensation as the latter has subsequently obtained from the wrong-doer, as if the money paid by the tortfeasor under such circumstances was really paid for the use of the insurer. By virtue of this doctrine there is no doubt of the right of an insurer, who has paid a loss, to use the name of the insured in order to obtain redress from the author of the wrong, — a right to be exercised for the benefit of the party equitably entitled to its benefits, not to be enforced by its possessor in his own name, but by him as the

¹ Rockingham Mut. Fire Ins. Co. v. Boshier, 39 Me. 253.

successor to the remedies of the person whom he has indemnified. Having no independent claim on the wrong-doer, he might be successfully met by the superior equities of the wrong-doer, such, for instance, as a payment to the party directly injured, without notice of the insurer's claim to be subrogated. Nothing can be plainer than that an indirect liability of this kind is an argument rather against the claim of a direct responsibility of the wrong-doer than a suggestion in its favor. The views taken by courts in recognizing the insurer's right of subrogation tend to sustain the principle which we now maintain."¹

§ 454. **Loss — Right of Subrogation.** — But in all those cases where the insured have a primary right against third parties, who have been the authors of the injury either through negligence or more culpable misconduct not amounting to felony, the insurers on making good the loss are entitled to enforce the remedy of the assured, and in their name to recoup themselves for their expenditure. This right is recognized by the courts as the right of subrogation. The contract of insurance is treated as an indemnity, and the insurer as a surety who is entitled to all the remedies and securities of the assured, and to stand in his place. If the insurers were first liable, payment by them would be a satisfaction and relieve the wrong-doer; but this is not so, for the latter is first liable. The assured have, indeed, a double remedy; if they pursue that against the wrong-doer and recover compensation the insurers escape, but if they choose to enforce the claim against the insurers in the first instance, the latter are entitled to use the name of the assured in an action to recover the money which they have paid.² And the right is based upon the equitable doctrine that where one has been obliged to pay money to another by the non-feasance or misfeasance of a third, who, being at fault, ought to bear the loss, the party so paying, as by his direct obligation towards the party suffering the loss

¹ See also *Propeller Monticello*, 17 How. 154; *Mason v. Sainsbury*, 26 E. C. L. 36, 3 Doug. 61; *Yates v. Whyte*, 33 E. C. L. 349, 4 Bing. N. C. 272; *Quebec Fire Ins. Co. v. St. Louis*, 22 Eng. L. & Eq. 73; *Hart v. W. R. Co.*, 13 Met. 99.

² *Bunyon*, *Fire Ins.* 165.

he may be compelled to do, shall be allowed, indirectly and through the right which the injured party had, to compel the wrong-doer to bear the burden which was imposed by his fault; although between him and the wrong-doer there is no direct relation upon which to found a cause of action. In other words, the party injured being so situated that he may call, by his right at law, upon the party who is responsible for the injury, or, by his contract, upon one who is not at fault, for his indemnity, if he elect the latter, then the latter shall be allowed to do, in his name, what in the first instance the injured party might have done, and justice, as between all the parties, decrees ought to be done. And this result is accomplished by the courts when suit is brought by the insurers in the name of the insured, by holding that the payment of the money to the latter is no satisfaction of the latter's claim against the wrong-doer. The liability of the wrong-doer is in legal effect first and principal, and that of the insurer secondary, not in order of time, but in order of ultimate liability. And where the insured insists upon his remedy against the party secondarily liable, he is conscientiously bound to make an assignment, in equity, to the person entitled to the benefit, and the acceptance of the indemnity from the insurers is in the nature of an equitable assignment, which authorizes the assignor to sue, in the name of the assignee, for his own benefit. And this is a right which a court of equity will support, by restraining and prohibiting the assignee from defeating it by a release. Thus where a house was destroyed by a mob, and the insurers paid the loss, a suit against the hundred which was primarily responsible was maintained in the name of the insured, but for the benefit of the insurers.¹ So where the underwriters have paid a loss occasioned by sparks from a locomotive, they may recover from the railroad company the amount thus paid, in a suit in the name of the owner of the property destroyed,

¹ *Mason v. Sainsbury*, 3 Doug. 61. As to the liability for negligence at common law, see also *Yates v. Whyte*, 33 E. C. L. 349; *Quebec Fire Ins. Co. v. St. Louis*, 22 Eng. L. & Eq. 73; *Clark v. Inhabitants of Blything*, 2 B. & C. 254; *Ryan v. N. Y. Central R. R. Co.*, 352; *Webb v. Rome, &c., R. R. Co.*, 40 N. Y. 421.

which action the owner cannot control.¹ So where the loss is entailed by the negligence of a common carrier, whereby the goods entrusted to his care are destroyed by fire. As between a common carrier of goods and the insurer the liability for their loss is primarily upon the carrier, while the liability of the insurer is only secondary. In respect to the ownership of the goods and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract, or for a non-performance of his legal duty. The insurer stands practically in the position of a surety, and whenever he has indemnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the carrier. This right depends not upon privity of contract, but is worked out through the right of the creditor or owner, and in his name.² So where a house is wilfully burned by a third person, or a life is lost by the negligence of a steamboat or railroad company. But in all such cases the action must be brought in the name of the party directly injured, or his legal representatives, and an action in the name of the third party will not be sustained.³ But this right of subrogation does not accrue until payment, and full payment, of the liability which gives rise to such right on the part of the insurance company claiming to be subrogated. On payment of part only of that liability the right does not supervene.⁴ This liability for negligence existed at common law ;⁵

¹ *Hart v. Western R. R. Co.*, 13 Met. (Mass.) 99.

² *Hall v. Nash. & Chat. R. R. Co.*, 13 Wall. (U. S.) 367 ; *Gales v. Hailman*, 11 Penn. St. 515.

³ *Rockingham Mut. Fire Ins. Co. v. Bosher*, 39 Me. 253 ; *Peoria Mar. and Fire Ins. Co. v. Frost*, 37 Ill. 333 ; *Conn. Mut. Life Ins. Co. v. N. Y. & N. H. R. R. Co.*, 25 Conn. 265. In Lower Canada, however, where a church was set on fire and burned by the sparks from a passing steamboat, which had no grille on its chimney, the insurance company were allowed, after having paid the loss, after a transfer of the claim against the company, but without any legal assignment thereof by the church proprietors, to maintain in their own name an action against the steamboat company, to recover the amount they had been compelled to pay under the policy. *Quebec Fire Ass. Co. v. St. Louis*, 1 L. C. 222.

⁴ *People's Ins. Co. v. Straehle*, 2 Cincinnati Sup. Ct. Reporter, 186 ; *Neptune Ins. Co. v. Dorsey*, 3 Md. Ch. 338 ; *Kyner v. Kyner*, 6 Watts (Penn.), 221.

⁵ *Canterbury v. Attorney-General*, 1 Phil. 306 ; *Pigott v. Eastern Counties*

and in Massachusetts and perhaps other States, is imposed by statute, without regard to the question of negligence.

§ 455. **Loss — Subrogation — Wrong-doer can have no Benefit from Payment by the Insurer.** — The principles stated in the last section were further illustrated in a recent case in Vermont,¹ where a town which was sued for injuries resulting from a defect in a highway undertook to claim in its behalf, by way of reduction of damages, the amount which had been paid the plaintiff by an insurance company. But the court said there was no technical ground which necessarily leads to the conclusion that the money received by the plaintiff of the accident insurance company should operate as a defence *pro tanto*, or inure to the benefit of the town. The insurer and the defendant are not joint tortfeasors or joint debtors, so as to make a payment or satisfaction by the former operate to the benefit of the latter. Nor is there any legal privity between the defendant and the insurer, so as to give the former a right to avail itself of a payment by the latter. The policy of insurance is collateral to the remedy against the defendant, and was procured solely by the plaintiff and at his expense, and to the procurement of which the defendant was in no way contributory, and there is no legal principle which seems to require that he should have any benefit therefrom. To the suggestion that the plaintiff was entitled to but one satisfaction for the injury, the reply was, that if this was to be regarded as a correct proposition, the question would arise whether the defendant stands in a position which entitles him to make the objection. And this depends upon another question, Who, as between the insurer and the defendant, ought to pay the damage? which of the two ought necessarily to make compensation to the plaintiff, and ultimately to bear the loss? If the insurer ought ultimately to bear the loss, the defendant is entitled in this action to have the benefit of that payment; but if the defendant ought ultimately to bear the loss, then the payment by the insurer, and the collection of the entire damage

Railway Co., 3 C. B. 229; *Aldridge v. Gr. West. Railway Co.*, 3 M. & G. 515; *Longman v. Grand Junc. Canal Co.*, 3 F. & F. 738.

¹ *Harding v. Townshend*, 43 Vt. 536.

of the defendant, only creates an equity between the plaintiff and the insurer, to be ultimately adjusted between them, in which the defendant has no interest, and with which he has no concern.¹

§ 456. Loss — Subrogation — Intervention of Strangers to the Contract — Debtor and Creditor — Mortgagor and Mortgagee — Vendor and Vendee — Lessor and Lessee. — But this right of subrogation is based upon the fact that the person who pays the debt stands in the position of a surety, or is compelled to pay to protect his own interest, as where one is surety for another that he will account for moneys. A mere stranger or volunteer having no interested relationship to the parties, who pays the debt of another, cannot be subrogated to the creditor's rights.² On the other hand, if a stranger to the contract sees fit to donate to the insured the amount of any loss he may have suffered, this will not relieve the insurers from their obligation to perform their contract.³ Not even the insurers can intervene and intercept, or lay successful claim to a debt or its securities, when they are neither directly nor indirectly affected by the conduct of the creditor, or authorized by his consent. Indeed it may be stated, as a general rule, that no one, except the nominal assured, or his assignee after loss, can claim either from the insurers, or from the party to whom the loss has been paid, any part of the proceeds of a policy, unless by express agreement, or unless the policy covered property in which the claimant had an interest, and was intended and was effected in part or in whole for his benefit and at his expense.⁴ Thus a mortgagor cannot recover from a mortgagee except

¹ See also *Mason v. Sainsbury*, 3 Doug. 61; *Clark v. Inhabitants of Blything*, 2 B. & C. 254; *Yates v. Whyte et al.*, 4 Bing. N. C. 272; *Propeller Monticello v. Gilbert Mollison*, 17 How. (U. S.) 152, which were cited by the court as authorities upon the first point. The case of *Pym v. Great Northern Railway Co.*, 4 B. & S. 396, if not distinguishable, is opposed by *Althorp v. Wolf*, 22 Smith (N. Y.), 355. And the same may be said of *Hicks v. Newport Railway Co.*, an unreported case at *Nisi Prius*, referred to in a note to *Althorp v. Wolf*.

² *Hough v. Aetna Life Ins. Co.*, Sup. Ct. Ill., 1 Ins. L. J. 836.

³ *People's Ins. Co. v. Straehle*, 2 Cincinnati Sup. Ct. Reporter, 186.

⁴ *Steele v. Franklin Fire Ins. Co.*, 17 Penn. St. 290; *Turner v. Stetts*, 28 Ala. 420.

under such circumstances;¹ nor a consignor from a consignee;² nor a vendee from a vendor, who, not having assigned the policy, had, after loss of the property sold, collected the insurance;³ nor a lessor from a lessee;⁴ nor a lessee from a lessor;⁵ nor a debtor from a creditor.⁶ In order to give the right to intervene between the insurer and the insured, the party intervening must have some relation to, or concern with, the contract of insurance. But a creditor who acquires title to an estate under a levy of execution, the time for redemption having expired, has no relation to, or concern with, a contract of insurance between the former owner of the estate and the insurers, upon which to found a claim upon the latter for the amount of the loss, or any part of it.⁷ Payment to a creditor by an insurance company of the amount of a policy taken out and paid for by him on the life of the debtor, is not *pro tanto* a satisfaction of the debt, but the debt still remains a valid security for its full amount against the debtor.⁸ And the same is true of a mortgagee who insures for himself and at his own expense, and receives the amount due for the loss.⁹ Nor can a mortgagee, under such circumstances, paid by the insurers, be compelled to assign his mortgage debt to the insurers.¹⁰ But it has been held in New York¹¹ that where the mortgagor insures, and with assent of the company assigns to the mortgagee, the latter could only recover for a loss on condition of assigning to the insurers an interest in the mortgage equal to the amount paid by them.

§ 457. **Same Subject.** — Some of the earlier cases, indeed,

¹ *White v. Brown*, 2 Cush. (Mass.) 412; *Cushing v. Thompson*, 34 Me. 496; *Concord Mut. Fire Ins. Co. v. Woodbury*, 45 Me. 447.

² *Stillwell v. Staples*, 19 N. Y. 401, reversing same case in 6 Duer (N. Y.), 63.

³ *King v. Preston*, 11 La. An. 95.

⁴ *Merchants' Ins. Co. v. Mazange*, 22 Ala. 168.

⁵ *Miltenberger v. Beercom*, 9 Penn. St. 198; *Tongue v. Nutwell*, 31 Md. 302.

⁶ *Bruce v. Gardner*, 22 L. T. N. s. 1002.

⁷ *Plympton v. Farmers' Mut. Fire Ins. Co.*, 43 Vt. 497.

⁸ *Humphrey v. Arabin*, 2 Lloyd & Goold, 318.

⁹ *White v. Brown*, 2 Cush. (Mass.) 412.

¹⁰ *King v. State Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 1; *Suffolk Fire Ins. Co. v. Boyden*, 9 Allen (Mass.), 123.

¹¹ *Kip v. Mut. Fire Ins. Co.*, 4 Edw. Ch. (N. Y.) 86.

seem to have gone further in favor of the insurer than is conceded to be permissible according to the doctrine of the cases cited in the last section. Thus in *Ætna Insurance Company v. Tyler*,¹ it was held that where the property insured is held by a vendee under a contract of sale, and a portion of the purchase-money remains unpaid at the time of the loss, and the insured receives the amount of the loss of the underwriter, the latter will be entitled to be substituted in the place of the insured in respect to his rights and remedies against the purchaser. And upon the doctrine of the last case the Court of Errors and Appeals of New Jersey² broadly laid down the rule that where a party holding a lien upon real estate to secure a debt effects an insurance upon such property, in case of a loss the insurance company, upon payment of the insurance, will be entitled to the benefit of the security held by the insured to the amount of the money paid; and if they pay the insured the whole amount of the claim for which he holds such security, they will have a right to the whole of the security held by him. And if the insured holds other securities for the same debt, the insurers will have a right to them also; and if after effecting the insurance the insured parts with a portion of his securities, he will forfeit the right *pro tanto* to recover of the insurers. But *Benjamin v. Saratoga County Mutual Insurance Company*,³ where a vendor, under a contract of sale, agreed with the vendee to sell him the property, the vendee to pay him the premiums he might pay under an insurance which he already had for continuing the same, of which facts the insurers had notice and to which they gave their consent, and it was held that, upon payment of the loss to the vendor, the insurers were not entitled to be subrogated to his rights against the vendee; and *Kernochan v. New York Bowery Fire Insurance Company*,⁴ where a policy was taken out in the name of the mortgagee, under an agreement between him and the mortgagor that the mortgagee should pay the premiums, the insurers knowing nothing of the agreement, and the insurers were

¹ 16 Wend. (N. Y.) 385.

² *Sussex County Mut. Ins. Co. v. Woodruff*, 2 Dutch. (N. J.) 541.

³ 17 N. Y. 415.

⁴ *Ibid.* 428.

held not entitled to subrogation,—seem hardly consistent with the two cases just cited in this section.¹ And of course a subrogated right will be strictly that of the original party, and if he cannot recover neither can the party who claims through him.²

§ 458. **Loss — Right of Insurers to intervene by Contract — Mortgagor and Mortgagee.** — In order to prevent a mortgagee from making his insurable interest a speculation whereby in case of loss he may recover the amount insured and yet recover the amount due from the mortgagor on account of the mortgage, it is usual to provide that in case of payment of any loss to a mortgagee whose interest only is insured, the party so paid shall, at the time of payment, assign to the company so much of his interest in the mortgage as may not be necessary to extinguish the balance of the debt due thereon. It seems that under such a provision, if the mortgagee enters into any contract which by its terms would be inconsistent with his right of assignment of the mortgage debt, such contract would constitute a valid bar to his recovery. But a contract whereby the mortgagee in possession lets a third party into that possession, and agrees for a consideration to be paid at a future time that he will upon such payment assign the mortgage, the contract being still unexecuted, is not such a contract.³ The *Springfield Fire and Marine Insurance Company v. Brown* ⁴ presented a case where a policy was issued to the owner of mortgaged premises in which the loss was made payable to the mortgagee, and which provided also that in case of any change of title the policy should be void (except as to the interest of the mortgagee), and further, that in case of payment of loss to the mortgagee, for which the insurers would not have been liable to the mortgagor, the insurers should be subrogated to the rights of the mortgagee; and it was held, on a bill to foreclose, that the property having been sold contrary to the conditions of the policy, and the insurers having paid the mortgagee his loss and taken an assignment of his mortgage, the mort-

¹ See also *Bradford v. Greenwich Ins. Co.*, 8 Abb. (N. Y.) 261.

² *Alliance Mar. Ins. Co. v. Lou. State Ins. Co.*, 8 La. 1.

³ *Davis v. Quincy Mut. Fire Ins. Co.*, 10 Allen (Mass.), 113.

⁴ 43 N. Y. 389.

gagor could not require the amount paid the mortgagee by the insurer to be appropriated towards the liquidation of the mortgage.

§ 459. **Loss — Negligence — Proximate Cause.** — Much discussion has been had on the subject of the liability of railroads for negligence, largely turning upon the distinction between remote and proximate causes. In *Ryan v. New York Central Railroad*,¹ where fire was first communicated by sparks from the engine to a wood-shed of the company, and thence by sparks from the shed to the property of the plaintiff, it was held that the cause was remote, and the plaintiff could not recover. And this case seems to have been followed in Pennsylvania.² But in Massachusetts³ it was held that such a circumstance did not affect the question of immediateness or remoteness; and in *Perley v. Eastern Railroad Company*,⁴ referring to the case in New York, the court say : —

“The defendant’s counsel have referred us to the case of *Ryan v. New York Central Railroad Company*.⁵ We understand the liability in that State is by the common law, and not under the provisions of any statute. In that case a distinction is made between proximate and remote damages. The fire was communicated from the defendants’ locomotive to their wood-shed, and thence by sparks, one hundred and thirty feet, to the plaintiff’s house; and it was held that the plaintiff could not recover, because the injury was a remote, and not a proximate consequence of the carelessness of the defendants in permitting their fire to escape. Our own cases, above referred to, are not noticed in the opinion. Nor does the opinion draw any line of distinction between what is proximate and what is remote; and such a line is not obvious in that case. If, when the cinder escapes through the air, the effect which it produces upon the first combustible substance against which it strikes is proximate, the effect must continue to be proximate as to every thing which the fire consumes in its direct

¹ 35 N. Y. 210.

² Penn. R. R. Co. v. Kerr, 62 Penn. 363.

³ Hart v. Western R. R. Co., 13 Met. (Mass.) 99.

⁴ 98 Mass. 418.

⁵ 35 N. Y. 210.

course. This is so, whether we regard the fire as a combination of the burning substance with the oxygen of the air, or look merely at its visible action and effect. As matter of fact, the injury to the plaintiff was as immediate and direct as an injury would have been which was caused by a bullet, fired from the train, passing over the intermediate lots and wounding the plaintiff as he stood upon his own lot. It is as much so as pain and disability are proximate effects of an injury, though they occur at intervals through successive years after the injury was received. Yet these are called proximate effects, though the actual effects of the injury may be greatly modified in every case, by bodily constitution, habits of life, and accidental circumstances.

“The instructions given in respect to the back fires, which were kindled with a view to check the fire which had proceeded from the locomotive, were correct; for they required the jury to find, in substance, that these fires did not in fact contribute to the loss of the plaintiff, but that they were swallowed up by the advancing flame which went on and destroyed the plaintiff’s property.”¹

¹ By the statute of Massachusetts, the railway company is liable for fires caused by sparks communicated by the engine, without reference to the question of negligence on their part. By the common law the liability is based upon negligence; but it is not easy to see how the distinction at all enters into the question whether a cause is proximate or remote. The opinions must be regarded as directly opposed to each other. *Ryan v. N. Y. Central R. R. Co.* has been said to be inconsistent with the prior case of *Field v. N. Y. Central R. R. Co.*, 32 N. Y. 339, in *Webb v. Rome, &c., R. R. Co.*, 3 Lansing (N. Y.), 453. This, however, was not admitted by the Court of Appeals; nevertheless, they affirmed the judgment in *Webb v. Rome, &c., R. R. Co.*, 49 N. Y. 421, although that was founded upon the case of *Field v. N. Y. Central R. R. Co.*, and assumed that case to be totally inconsistent with *Ryan v. N. Y. Central R. R. Co.*

CHAPTER XX.

OF THE NOTICE, PRELIMINARY PROOF, PARTICULAR ACCOUNT, AND
PAYMENT OF THE LOSS.

§ 460. **Notice — Preliminary Proof — Particular Account.** — When a loss has occurred, it devolves upon the assured to give notice thereof, and also to furnish some proof thereof and of the amount claimed. These duties are usually required in substantially the same phraseology, and with greater or less exactness and particularity, as conditions precedent to the right to demand payment, and in order that the insurers may investigate for themselves the validity of the claim. They are also usually required within a certain specified time, though not always.

§ 461. **Notice of Loss — Time and Mode.** — When the time of notice is specified, it must be given within the time required by the conditions of the contract.¹ It need not be in writing, unless expressly so stipulated;² nor need the insured go to the office or to the agent of the insurers for the purpose of giving the notice. If the persons authorized to receive notice on behalf of the insurers go to and inspect the premises, they thereby obtain all the information which it is the object of the notice to bring to their knowledge, and further notice will be useless and unnecessary. Thus where the president and one of the directors of the company visit the scene of the fire for the purpose of examining into the matter, no further notice on the part of the insured will be required.³ The form is immaterial, if it includes the fact to be made known, however much it is overloaded with surplusage.⁴ Where the notice of

¹ *Davis v. Davis*, 49 Me. 282.

² *Killips v. Putnam Fire Ins. Co.*, 28 Wis. 472.

³ *Roumage v. Mechanics' Fire Ins Co.*, 1 Green (N. J.), 110.

⁴ *Rix v. Mut. Ins. Co.*, 20 N. H. 198.

loss and affidavit were required to state "the value of such parts as remain," and the notice stated that the building was destroyed on a certain day, and was a total loss, it appearing that the building destroyed was insured for fifteen hundred dollars, and was valued at two thousand four hundred, and that the brick and stone work uninsured was worth about one hundred dollars, it was held that the notice of the loss was sufficient, in the absence of any evidence that it was objected to, or a more particular statement required.¹

§ 462. **Notice** — "**Forthwith**" — "**Soon as Possible**," &c. — If the notice be required to be "forthwith," or "as soon as possible," or "immediately," it will meet the requirement, if given with due diligence under the circumstances of the case, and without unnecessary and unreasonable delay, of which the jury are ordinarily to be the judges. To give the word a literal interpretation would in most cases strip the insured of all hope of indemnity, and policies of insurance would become practically engines of fraud.² Thus notice within eight days after the fire, and within five days after it came to the knowledge of the insured, has been held to be reasonable.³ So, where the fire happened on the tenth, and notice of loss, dated the eleventh, reached the insurers on the fifteenth of the same month.⁴ But a delay of four months in one case,⁵ of thirty-eight days in another,⁶ of twenty days in another,⁷ and of eleven days in another,⁸ there being no sufficient excuse therefor, has been held to be unreasonable. Yet where the insurers had, contrary to their agreement, refused to issue a policy, they

¹ *Wyman v. People's Equity Ins. Co.*, 1 Allen (Mass.), 301.

² *Kingsley v. New England Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 393; *Peoria Ins. Co. v. Lewis*, 18 Ill. 533; *Edwards v. Baltimore Ins. Co.*, 3 Gill (Md.), 176; *Prov. Life Ins. Co. v. Baum*, 29 Ind. 236; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278; *Phillips v. Prot. Ins. Co.*, 14 Mo. 220.

³ *New York Central Ins. Co. v. Nat. Prot. Ins. Co.*, 20 Barb. (N. Y. Sup. Ct.) 468.

⁴ *Schenck v. Mercer County Mut. Ins. Co.*, 4 Zabr. (N. J.) 447; *West Branch Ins. Co. v. Helfenstein*, 40 Penn. St. 289.

⁵ *McEvers v. Lawrence*, 1 Hoff. Ch. (N. Y.) 171.

⁶ *Inman v. Western Fire Ins. Co.*, 12 Wend. (N. Y.) 452.

⁷ *Whitehurst v. North Carolina Mut. Ins. Co.*, 7 Jones, Law (N. C.), 436.

⁸ *Trask v. State Fire and Mar. Ins. Co.*, 29 Penn. St. 198.

were held to have waived their right to object to a notice sent even eleven months after the loss.¹ Whether due diligence has been used in giving the notice is a question which is ordinarily left to the jury, to be found from all the circumstances in the case.² But where the facts and circumstances bearing upon the question of due diligence are not in dispute, it becomes a question of law for the court.³

§ 463. **Notice by whom and to whom given.** — The assured, no other party being interested, is the proper person to give the notice. But although the notice is required from the insured, a notice signed by a third person at the request of the insured, though not on its face appearing to have been by his request, is a sufficient compliance with the requirement.⁴ If the policy has been assigned by the assured with the assent of the insurers, the notice of loss properly comes from the assignee.⁵ And a notice from the local agent of the company, upon information communicated to him by the assured, is sufficient.⁶ In many cases the policy designates the person to be notified, as the president, secretary, or agent of the company. It is essential that in such cases the notice should be given to the person designated.⁷ Where it was provided in a policy which had been negotiated through a local agent of the defendants that notice of loss must be given to the manager, "or to some known agent of the company," and before the loss the defendants had transferred their business to another company, it was held that a notice of loss given to the local agent was sufficient, the plaintiff having had no notice of the change in business, or termination of the agency.⁸ But a director is not an "authorized" officer to receive such a notice.⁹

¹ *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. (U. S.) 390.

² *Edwards v. Baltimore Ins. Co.*, 3 Gill (Md.), 176.

³ *Kimball et als. v. Howard Fire Ins. Co.*, 8 Gray (Mass.), 33.

⁴ *Stimpson v. Monmouth Mut. Fire Ins. Co.*, 47 Me. 349.

⁵ *Cornell v. Leroy*, 9 Wend. (N. Y.) 163.

⁶ *West Branch Ins. Co. v. Helfenstein*, 40 Penn. St. 289.

⁷ *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621; *Inland Ins. and Dep. Co. v. Stauffer*, 33 Penn. St. 397.

⁸ *Marsden v. City and County Ass. Co.*, 1 Law Rep. (C. P.) 232.

Inland Ins. and Dep. Co. v. Stauffer, 33 Penn. St. 397.

§ 464. **Notice — Waiver.** — Although the notice of loss must be given, if required, and as required, yet as it is a stipulation for the advantage of the insurers, it is in their option to waive any delinquency on the part of the insured in this respect. And such a waiver will be inferred from any conduct on the part of the insurers clearly inconsistent with an intention to insist upon the failure to give due notice; as, for instance, the payment of so much as they estimate the loss to be, though not so much as is claimed by the insured, or, in other words, a payment of a part of the amount claimed to be due under the policy.¹ There seems to be no reason to doubt that a waiver is equally effectual whether the notice be a general statute requirement, or is provided for in the act of incorporation, or be a condition of the contract. Being all alike provisions for the benefit of the insured, they may be waived, even though the waiver apply to defects which are in violation of express statute provisions.² A vote, however, to indefinitely postpone the question of the payment of a loss is no waiver of a condition in the policy requiring notice of a loss within thirty days. It is rather a refusal to allow any thing on account of it. A failure to give notice within the time required stands upon a different ground from a failure to give the notice in due form. The latter defect may be remedied by a new and more accurate form, but the former, if insisted upon by the insurers, is irremediable. It may, indeed, be waived, but it would be reasonable to require a different kind of evidence from that which ought to be satisfactory in cases of a mere defect in form. The silence of the insurers upon a mere defect of form might be very injurious to the assured, since, if the defect were pointed out to him, he might at once supply the deficiency, and save himself from loss. A failure to give the notice in due time, on the contrary, leaves the insured entirely at the mercy of the insurers, and to point out to him the fact will not in the least aid him to remedy the defect. The omission to point it out to him is therefore no wrong or prejudice

¹ *Westlake v. St. Lawrence Mut. Ins. Co.*, 14 Barb. (N. Y.) 207.

² *Lewis v. Monmouth Mut. Fire Ins. Co.*, 52 Me. 492.

or want of good faith towards him, nor is the insurer under any legal obligation so to do.¹

§ 465. **Preliminary Proofs — Time and Form — “Due Notice” —** As to the time within which the preliminary proofs must be furnished, as in the case of notice, if it is specified definitely it must be complied with.² And if no definite time is fixed, they are to be furnished within a reasonable time. And a failure to forward any proofs at all within the required time will be fatal, although the circumstances were such, as where the insured in an accident policy, who met with an instantaneous death, and no survivor knew of the existence of the policy, that it was impossible that such notice should be given. The court said that this was not a case where the notice was rendered impossible by the act of God, for the insured might have provided for the contingency by informing some one of the existence of the policy.³ This certainly is applying the rule with great strictness, and seems hardly consistent with the recent decision in the Supreme Court of the United States, where it is held that if the insured be insane at the time when it becomes necessary to furnish his preliminary proof, this will excuse the non-performance of that requirement.⁴ But inability by reason of loss of the policy is no excuse.⁵ And if any particular facts are required to be proved, or any particular mode of proof is required, the facts must be proved, and in substantially the mode specified. No doubt the usual stipulations that the insured shall furnish certain preliminary proofs of loss, when loss has been sustained, are conditions precedent, without compliance with which no recovery for a loss can be had. But in conformity to the general rule applicable to conditions precedent, a failure to comply with which works a forfeiture, they will be construed strictly against the

¹ *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278.

² *Smith v. Haverhill Mut. Fire Ins. Co.*, 1 Allen (Mass.), 297.

³ *Gamble v. Accident Ass. Co.*, 4 Irish (Law Exch.), 204.

⁴ *Germania Fire Ins. Co. et als. v. Boykin*, 12 Wall. (U. S.) 433. And see also *Insurance Companies v. Weides*, 14 Wall. (U. S.) 375.

⁵ *Blakeley v. Phoenix Ins. Co.*, 20 Wis. 205. And see *post*, § 475.

insurers who impose them, and for whose benefit they are imposed, and liberally in favor of the insured, upon whom they impose burdens more or less onerous; so that the latter will be held to nothing in this behalf not expressly required by the terms of the condition.¹ And if loss from certain enumerated causes is excepted out of the risks assumed by the policy, it is enough to state that the loss was by a cause not excepted, without negating the fact that the loss was within the excepted risks.² "Due notice and proof of death" is such notice and proof as shall appear to the court according to the rules of evidence to be due, and not such as in the opinion of the insurers, or other insurance companies, may be due. And a pamphlet given to the assured at the time he gives notice of the loss, setting forth the proof required, has no binding force on the assured, unless it be shown that he has agreed to it in some way, or was so well aware of these requirements that he may be presumed to have contracted with reference to them as customary.³ And a bare notice, not objected to before trial, will be sufficient.⁴ The proviso will be liberally construed to save a forfeiture; and unless the policy expressly calls for specific information, and sets forth what the proof shall be, no particular kind of proof can be insisted on, provided it furnish such evidence, within the reasonable efforts of the insured to obtain, as ought to be satisfactory.⁵ And if the policy provides for satisfactory proof of the death, and such further evidence as the directors may think necessary to establish their claim, this can only be understood to mean such evidence as the directors

¹ *Catlin v. Springfield Fire Ins. Co.*, 1 Sumner (U. S.), 434; *Wellcome v. People's Equitable Mut. Fire Ins. Co.*, 2 Gray (Mass.), 480; *Mason v. Harvey*, 8 Wel. Hurl. & Gor. (Exch.) 819; *Spring Garden Mut. Ins. Co. v. Evans*, 9 Md. 1; *Roper v. Lendon*, 1 Ell. & Ell. (Q. B.) 825; *Commonwealth Ins. Co. v. Sennett*, 41 Penn. St. 161; *Blakeley v. Phoenix Ins. Co.*, 20 Wis. 205; *Bumstead v. Dividend Mut. Ins. Co.*, 2 Ker. (N. Y.) 81; *Gilbert v. North American Ins. Co.*, 23 Wend. (N. Y.) 43; *Battaile v. Merchants' Ins. Co.*, 3 Rob. (La.) 384; *Great Western Ins. Co. v. Staaden*, 26 Ill. 360.

² *Catlin v. Springfield Fire Ins. Co.*, 1 Sumner (U. S.), 434; *Lounsbury v. Prot. Ins. Co.*, 8 Conn. 459.

³ *Taylor v. Aetna Life Ins. Co.*, 13 Gray (Mass.), 434.

⁴ *Heath v. Franklin Ins. Co.*, 1 Cush. (Mass.) 257.

⁵ *Mason v. Harvey*, 8 Exch. 819; *Walsh v. Wash. Mar. Ins. Co.*, 32 N. Y. 427. And see also the two cases last cited.

might reasonably, and not such as they might unreasonably and capriciously require.¹

§ 466. **Preliminary Proof — Form and Mode.** — We have just said that the preliminary proof must be substantially in the mode required. It has been, indeed, very generally held that the production of the certificate of “the minister, &c., of the parish,” that he knew and verily believed that the loss really happened by misfortune and not by fraud, if required, was a condition precedent to recovery, although he had refused, without reasonable cause, to give such a certificate.² So, if a similar certificate be required from the “nearest magistrate,”³ or from a “magistrate of the city.”⁴ But in such cases the court will not go into a nice calculation to ascertain whether some other magistrate than the one whose certificate is presented does not live, or, if he does not live, have his office nearer than the certifying one. This is a case for the application of the maxim, *de minimis non curat lex*. The spirit of the condition requires no such mathematical precision. Its object is completely secured by the proximity of the certifying magistrate. If such a rigid rule were to be applied the condition would become impossible of execution if two magistrates should be found to be living equidistant.⁵ And where two magistrates were nearer than the one whose certificate was procured, but they were creditors of the insured, it was held that the magistrate whose certificate was obtained was the proper officer to certify.⁶ Indeed, in this latter case, the court were inclined to deny to the provision the validity and effect of a condition precedent, but rather to treat it as directory only. So where several magistrates had their places of business nearer to the fire than the place of business of the magis-

¹ Braunstein v. Accidental Death Ins. Co., 1 B. & S. 782.

² Worsley v. Wood, 6 T. R. 716.

³ Cornell v. Hope Ins. Co., 3 Martin (La.), 223; Roumage v. Mechanics' Ins. Co., 1 Green (N. J.), 110; Noonan v. Hartford Fire Ins. Co., 21 Mo. 81; Leadbetter v. Aetna Ins. Co., 17 Me., 265

⁴ Prot. Ins. Co. v. Pherson, 5 Ind. 417; Scott v. Phoenix Ass. Co., Stuart (Lower Canada), 354.

⁵ Turley v. North American Fire Ins. Co., 2 Wend. (N. Y.) 379.

⁶ Aetna Ins. Co. v. Miers, 5 Sneed (Tenn.), 139. And see *post*, § 473.

trate who certified, though there was no evidence that their places of residence were nearer, the certificate was held sufficient.¹ And in *Cornell v. Leroy*,² the testimony of a witness that he thought the certifying magistrate lived nearer the insured premises than another magistrate named, but was not certain, and did not know but other magistrates resided nearer than the certifying one, was held sufficient *prima facie* proof of the allegation that the certificate was that of the nearest magistrate. In *Ætna Fire Insurance Company v. Tyler*,³ a certificate which omitted such important facts, though required, as that the person certifying was acquainted with the circumstances of the insured, and also the amount of damage sustained by him, was held to be sufficient. And in *Bilbrough v. Metropolis Insurance Company*,⁴ it was held too late to make the objection that the certificate was defective for the first time at the trial. So in *Ketchum v. Protection Insurance Company*,⁵ it was held unnecessary to prove that the magistrate certifying was not related to the deceased. Nor can such a certificate be exacted by a mere notice that it will be required, or any thing short of an express stipulation in the contract.⁶ And even the substitution of the certificate of another person, not a magistrate, for that of the nearest magistrate, which is required by the policy, will be waived if received and assented to by the agent as sufficient.⁷ By statute in Maine⁸ the insured is to make oath to his statement of loss "before some disinterested magistrate," and this obviates the objection under contracts made in that State that the certificate of the nearest magistrate, as is frequently required, should be obtained. And no informality in the certificate furnished under the statute, not objected to at the time when the certificate is furnished, can afterwards be objected to

¹ *Longhurst v. Conway Fire Ins. Co.*, Dist. Ct. (U. S.) Iowa, Northern Dist., 1861, cited in *Clarke's Digest of Fire Insurance Cases*. See also *Peoria Mar. and Fire Ins. Co. v. Whitehill*, 25 Ill. 466.

² 9 Wend. N. Y.) 163.

³ 16 Wend. N. Y.) 385.

⁴ 5 Duer (N. Y. Superior Ct.), 587.

⁵ 1 Allen (N. B.), 136.

⁶ *Taylor v. Ætna Life Ins. Co.*, 13 Gray (Mass.), 434.

⁷ *Taylor v. Roger Williams Ins. Co.*, 51 N. H. 50.

⁸ 1861, c. 34, § 5.

the claim of the plaintiff.¹ And it may be said, generally, that the tendency of the courts in the matter of preliminary proofs is to hold, as in the case of immaterial statements, and such as do not concern the risk, made warranties by express stipulation, that a substantial compliance is all that is necessary; and in some cases the substitution of equivalents has been allowed.²

§ 467. **Life Insurance — Preliminary Proof — Family Physician.** — That the insurers may have an opportunity the better to investigate the causes of death for their own satisfaction, if they so desire, it is usually provided that the preliminary proofs shall give the name or names of the attending physician or physicians; and where a friend and neighbor of the deceased, who was a regular physician, but who had abandoned the practice of his profession, was called in because it was deemed advisable to have the advice of a physician at once, and before the possible arrival of the regular family physician, who had been summoned and in due time attended, it was held that by the attending physician was meant the usual family physician, and his name only need be given in the preliminary proof.³

§ 468. **Preliminary Proof — Waiver.** — But the incompleteness and even non-production of all preliminary proof may be waived, and will be excused, on the ground of waiver, by the insurers, if their conduct is such as to render the production or correction useless or unavailing, or as to induce in the mind of the insured a belief that no proofs will be required, or that those already furnished, though in fact defective, are satisfactory and therefore sufficient. If the insurers intend to insist upon defects in the preliminary proof, they should indicate their intention in such a way that the insurer may not be deceived into a false security, and at such time that he shall have opportunity to supply the defects. If they wish further information they should point out in what respect, or they will be presumed to be content with what has been furnished.⁴

¹ *Bailey v. Hope Ins. Co.*, 56 Me. 474.

² See *ante*, § 163.

³ *Gibson v. American Mut. Life Ins. Co.*, 37 N. Y. (10 Tiff.) 580.

⁴ *Charleston Ins. Co. v. Neve*, 2 McMullen (S. C.), 237; *Lewis v. Monmouth*

And the burden of proof of notice of the defect is on the insurers. "It is to be observed," say the court in another case,¹ "that it is the duty of the insurers, pending the consideration of the proofs of loss, to bear themselves with all good faith towards the claimant, and if they are dissatisfied with the proof furnished, and have, or have not, the right to demand further proof before their liability becomes fixed, they ought to make known to the assured the fact and the nature of these demands without unnecessary delay. Otherwise they will be held to have waived their rights in this regard." As deficiencies in the preliminary proof may be supplied whenever objection to pay the loss is put upon that ground, good faith on the part of the insurers requires that, if they mean to insist upon formal defects, they should apprise the assured of the deficiencies, or put their refusal upon that ground, as well as others, so as to give him an opportunity to supply the defect before it is too late.² Thus where the insurers refuse to pay on special grounds, as that the contract was never completed,³ or that the insured had no interest,⁴ or any other grounds having no reference to the sufficiency or insufficiency of the preliminary proof, it is a waiver of their right to object to any deficiency in this particular.⁵ So upon the ground of inconsistency with an intention to require further or better proofs, part payment of a loss, without objection to the absence or sufficiency of preliminary proof, is a waiver.⁶

§ 469. **Preliminary Proof — Waiver — General Denial of Liability.** — A distinct denial of liability and refusal to pay, on the

Mut. Fire Ins. Co., 52 Me. 492; *Post v. Ætna Ins. Co.*, 43 Barb. (N. Y.) 351; *Killips v. Putnam Fire Ins. Co.*, 28 Wis. 472.

¹ *Harris v. Phoenix Ins. Co.*, 35 Conn. 310.

² *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 85; *Bodle v. Chenango County Mut. Ins. Co.*, 2 Comst. (N. Y.) 53; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278; *O'Neil v. Buffalo Fire Ins. Co.*, 3 Comst. (N. Y.) 122; *Clark v. New England Ins. Co.*, 6 Cush. (Mass.) 342; *Dawes v. North River Ins. Co.*, 7 Cow. (N. Y.) 426; *Insurance Co. v. Connor*, 5 Harris (Penn.), 136; *McMasters v. West Chester County Mut. Ins. Co.*, 25 Wend. (N. Y.) 383.

³ *Talloe v. Merchants' Ins. Co.*, 9 How. (U. S.) 390.

⁴ *Coursin v. Penn. Ins. Co.*, 46 Penn. 323.

⁵ *Heath v. Franklin Ins. Co.*, 1 Cush. (Mass.) 257.

⁶ *Westlake v. St. Lawrence County Mut. Ins. Co.*, 14 Barb. (N. Y.) 206.

ground that there is no liability, is a waiver of the condition requiring proof of the loss. It is equivalent to a declaration that they will not pay though the proof be furnished; and to require the presentation of proof in such a case, when it can be of no importance to either party, and the conduct of the party in favor of whom the stipulation is made has rendered it practically superfluous, is but an idle formality, the observance of which the law will not sustain. So if the insurers decline to pay without giving any reason upon which to rest their refusal, such a refusal, by necessary implication, gives the assured to understand that the production of preliminary proof will be useless, — an idle ceremony which the law will not require him to perform.¹ Even where there has been no refusal to pay the loss, the preliminary proof being insufficient, if without objection on that account the insurers proceed to investigate the loss for themselves, it has been held that the evidence so obtained shall inure to the benefit of the insured as part of his preliminary proof.² So, if the insurers throw any obstacles in the way of the insured in his efforts to bring the proofs within the requirements of the condition. Thus where imperfect proofs have been filed within the required time, and the insured afterwards, upon being so informed, requests copies, which, after repeated evasions, are finally refused, corrected proofs, filed after the expiration of the limited time, will be sufficient. In other words, the insurers will not be allowed to insist upon a deficiency which they have contributed to produce.³ And of course the waiver of the proof is a waiver of the condition that payment is not to be made till a limited time after the proof; so that, in such case, suit may be brought at once upon the denial of liability, although the time within which, after proof of loss, the payment would be demandable may not have expired.⁴

§ 470. Preliminary Proof — Particular Defects pointed out,

¹ *Allegre v. Maryland Ins. Co.*, 6 H. & J. (Md.) 408; *Tayloe v. Merchants' Ins. Co.*, 9 How. (U. S.) 390; *Graves v. Wash. Mar. Ins. Co.*, 12 Allen (Mass.), 391.

² *Sexton v. Montgomery County Mut. Ins. Co.*, 9 Barb. (N. Y.) 191.

³ *Cornell v. Le Roy*, 9 Wend. (N. Y.) 163.

⁴ *Nor. & N. Y. Transp. Co. v. Western Mass. Ins. Co.*, 34 Conn. 561.

Waiver of others. — So where the insurers place their refusal to pay the loss expressly upon some particular defect in the preliminary proofs, they cannot afterwards object to other defects not then specified; ¹ or upon grounds entirely distinct from such defects, making no objection to these, as where the insured gives notice of his loss, and, having lost his policy, requests a copy, for which he expresses his willingness to pay, in order that he may furnish the necessary proofs, but receives a reply stating that his claim is rejected for the reason that the policy had been cancelled for non-payment of assessments. Such action on the part of the insurers relieves the insured from the necessity of furnishing any preliminary proof.² So, if the refusal to pay is upon the ground that the property lost was not included in the risk;³ or that the insured has forfeited his right to recover by fraud.⁴

§ 471. **Preliminary Proof — What is not a Waiver.** — But a general statement of a travelling agent to the insured that “the matter would be all right with the company,” will not amount to a waiver of “notice specifying the amount of loss, the manner of it, and other particulars.”⁵ Nor will a reply by the president of the company to the question, What further proof is required? that the policy will show, be a waiver of proof or of defects therein.⁶ Nor is a reply of the president to an explanation of the reason of failure to give notice that the company would be disposed to do what is right amount to such waiver.⁷ And a waiver of notice is not a waiver of the preliminary proof, or of the particular account, when they are treated by the policy as distinct and separate acts.⁸

§ 472. **Preliminary Proof — Evidence.** — In *Hinken v. Mutual*

¹ *Phillips v. Prot. Ins. Co.*, 14 Mo. 220.

² *Blake v. Exchange Mut. Ins. Co.*, 12 Gray (Mass.), 265; *Hartford Prot. Ins. Co. v. Harmer*, 22 Ohio, 452; *Noyes v. Washington County Mut. Ins. Co.*, 30 Vt. 659.

³ *Franklin Fire Ins. Co. v. Coates*, 14 Md. 285.

⁴ *Peoria Mar. and Fire Ins. Co. v. Whitehill*, 25 Ill. 466.

⁵ *Bogle v. North Carolina Mut. Ins. Co.*, 7 Jones, Law (N. C.), 373.

⁶ *Spring Garden Mut. Ins. Co. v. Evans*, 9 Md. 1.

⁷ *Smith v. Haverhill Mut. Fire Ins. Co.*, 1 Allen (Mass.), 297.

⁸ *Desilver v. State Mut. Ins. Co.*, 38 Penn. St. 130.

Benefit Life Insurance Company,¹ a question arose as to the amount of evidence necessary to sustain a verdict in favor of the insured upon the allegation of having furnished the required preliminary proof. And it was held that, when at the trial a witness testified that he had delivered the preliminary proofs within the required time, but nothing further appears as to what they were, except that they then were in the possession of the insurers, and that no objection had been made known, this was evidence that the preliminary proofs were in accordance with the requirements of the policy, and sufficient to sustain the verdict.²

§ 473. **Preliminary Proof — Stipulation as to Waiver** — And the insurers have been held to have waived their right to insist upon defects in preliminary proof, even though in one of the by-laws it is expressly agreed and declared by the parties that no condition, stipulation, or clause contained in the policy shall be waived except by writing indorsed on the policy, and all the by-laws are printed as conditions of insurance, and payment of loss is made subject to proof thereof in conformity to the conditions, it appearing that after informal and defective preliminary proofs had been delivered in, the president and secretary of the company examined the premises, and had interviews with the insured before the expiration of the time within which said proofs were to be given, and neither they then, nor the insurers afterwards, made any objection to the form or sufficiency of the preliminary proofs, while there was yet time to remedy defects, but put their refusal to pay on other and distinct grounds. Regarding the case as one of some difficulty, the court say: "How far the provisions, the form of the notice and proofs of loss, after a valid contract has been made and a loss taken place under it, can be regarded as conditions of the contract itself, it is not necessary to determine, nor whether their being classed under the designation of conditions of insurance could change the nature and purpose of the stipulations themselves; for it seems to us that the question is not as to the provisions of the contract,

¹ N. Y. Ct. of App., 2 Ins. L. J. 230.

² See also *Warner v. Peoria Mar. and Fire Ins. Co.*, 14 Wis. 318.

but as to the performance of the provisions. The plaintiff is not seeking to set up a contract from which a material provision has been omitted by the oral consent of the officers of the company. The policy contained the usual provisions as to notice and proofs of loss. Upon the happening of the loss the plaintiff sent to the defendants certain notices and proofs, in pursuance of the requisition of the by-laws upon the subject. If the notices were defective, good faith on the part of the underwriters required them to give notice to the insured. If they failed to do so; if they proceeded to negotiate with the plaintiff without adverting to the defects; if, still further, they put their refusal to pay on other and distinct grounds,—they are, upon familiar principles of law, estopped to set up and rely upon the defective notices. The law assumes that the notices were correct, and will not listen to the defendant when he seeks to show the contrary.¹ If the defendant relied upon any exemption from the obligations of the policy, or any modification of them by the agents or officers of the company, or any addition, he must show such exemption, modification, or addition, by indorsement upon the policy. But the question whether a stipulation as to notice and proofs of loss has been fulfilled, or whether the defendant is in a condition to be heard upon that question, must be tested by the ordinary rules of law. There is a time when objections in matters of form must be taken. If they are not then made, they never can be made. The law does not say the procedure was perfect, but that the question is not open. The adherence to, and liberal application of this principle, are necessary to the maintenance of good faith and fair dealing in judicial proceedings.”² It is worthy of observation that this is the language of a court which has resolutely resisted what appears to be the general tendency to apply the doctrines of waiver and estoppel in favor of the insured, where there has been a clear failure to comply with the express and essential conditions of the contract, but where,

¹ *Vos v. Robinson*, 9 Johns. (N. Y.) 192; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 401; *Heath v. Franklin Ins. Co.*, 1 Cush. (Mass.) 257; *Clark v. New England Mut. Fire Ins. Co.*, 6 Cush. (Mass.) 342.

² *Blake v. Exchange Mut. Ins. Co.*, 12 Gray (Mass.), 265.

nevertheless, it would be inequitable to permit the insurers to avail themselves of such a failure in defence of a claim for damages.

§ 474. **Particular Account.** — The particular account of the loss or damage, usually required as a part of the preliminary proof, demands some attention. What and how particular this must be will depend upon the nature of the property insured. If, for instance, it be a dwelling-house, a statement that it was totally destroyed on a given day, will be sufficient, if there was in fact a total loss. If, however, there is a partial loss, the extent of the damage should be stated. So in cases of insurance upon merchandise and personal effects generally, where the loss is only partial, the particulars of the nature, quality, and quantity of the effects, and of the damage sustained, should be given, in order to aid the insurers to form a judgment as to the amount of the loss. It is an account, in its technical sense, of the amount that is required, and not a statement, conjectural or otherwise, of the real or supposed causes of the loss or damage. In other words, the particular account is to be an account, and not an accounting for the loss or damage. If this were not clear upon the words themselves, the usual subsidiary clause making it compulsory upon the insured to produce, in addition to his account, if required, his books of account and other vouchers, would seem to leave no doubt upon the true construction of the provision. Of course it should be stated what was the cause of the loss or damage, so far as to bring it within the risk insured against, as that it was by fire, or by death, or by flood, or by storm, or by some particular accident, as the case may be, but not to the extent of stating how it happened or was occasioned.¹ It is also to be borne in mind, that with reference to notice, particular accounts, and preliminary proofs generally, courts will not require the insured to do more than is clearly required by the terms of the contract; and, whether these be general or particular, will treat them as conditions imposing burdens, to be for that reason construed liberally in favor of those upon whom

¹ *Catlin v. Springfield Fire Ins. Co.*, 1 Sumner (U. S. C. Ct.), 434.

the burdens are imposed.¹ And they will give due weight to the fact whether, in the particular case, the insurers have greater or less facilities for obtaining the required information irrespective of the communications of the insured. Thus, in fire insurance, where the insurers or their agents may make personal inspection, they will not require so great particularity as in marine insurance, where, not unfrequently, the inspection is wholly impracticable.²

§ 475. **Particular Account** — **What is required.** — The “particular account of loss or damage” does not require a statement of the manner in which the loss happened, or of the cause or the occasion of it; nor need it negative excepted causes of loss. The fact of loss within the risk, the subject-matter, and the amount of injury sustained, are all that are necessary.³ Nor need it state the interest of the insured, unless specially required.⁴ A general statement of the aggregate value of the property lost, which consisted of divers articles, has been held to be an excuse for an insufficient “particular account,” where from the loss of books and accounts, or for other causes, no better or more detailed statement could be made.⁵ But the account should not fail to give the amount of loss, and to state the fact that it was upon the property insured.⁶

§ 476. **Loss** — **When Suit may be brought** — **When Proof made.** — If the loss be made payable at a certain specified time after the rendition of the requisite preliminary proof, no action brought before the lapse of that time can be maintained.⁷ And if new proofs are furnished in the place of defective ones, the

¹ *Heath v. Franklin Ins. Co.*, 1 Cush. (Mass.) 257; *Catlin v. Springfield Fire Ins. Co.*, 1 Sumner (U. S. C. Ct.), 434; *Lawrence v. Ocean Ins. Co.*, 11 Johns. (N. Y.) 260; *Norton v. Rensselaer and Saratoga Ins. Co.*, 7 Cow. (N. Y.) 645.

² *Haff v. Mar. Ins. Co.*, 4 Johns. (N. Y.) 132.

³ *Catlin v. Springfield Ins. Co.*, 1 Sumner (U. S. C. Ct.), 434.

⁴ *Gilbert v. North American Ins. Co.*, 23 Wend. (N. Y.) 43; *Miller v. Eagle Life Ins. Co.*, 2 E. D. Smith, 268.

⁵ *McLaughlin v. Washington County Ins. Co.*, 23 Wend. (N. Y.) 525; *Norton v. Rensselaer and Saratoga Ins. Co.*, 7 Cow. (N. Y.) 645; *Bumstead v. Dividend Mut. Ins. Co.*, 2 Ker. (N. Y.) 81; *Hoffman v. Aetna Fire Ins. Co.*, 1 Robt. (N. Y.) 501; s. c. 32 N. Y. 405.

⁶ *Lycoming County Mut. Ins. Co. v. Updegraff*, 40 Penn. St. 311.

⁷ *Harris v. Prot. Ins. Co.*, 1 Wright (Ohio), 548.

time within which the action may be brought is to be reckoned from the presentation of the new proofs;¹ but if the policy requires notice of loss, making no mention of the proof or time of payment, the loss will be payable in a reasonable time after notice.² If the policy require that the particular account shall be delivered in, the insured must see to it, at his peril, that the account arrives at the office within the required time. A general request of the company that all communications and notices be addressed to them postpaid, will not excuse such an address of such a particular account.³

§ 477. **Preliminary Proof — Fraud and false Swearing — Payment by Mistake.** — The fraud and false swearing in the preliminary proof, which it is sometimes provided shall prevent a recovery, is intentional, and with the purpose of defrauding. It may be done with reference to any material matter, — by overvaluing the loss, by undervaluing what is saved, by swearing to the loss of property which was not in existence, and in divers other ways.⁴ A claim honestly made is not, under the condition against fraud, invalidated on account of error, or even some degree of exaggeration or overestimate; but if the insured, with reference to the quantity or the value of the goods insured, makes a claim which he knows to be false and unjust, then he cannot recover any thing.⁵ And the mere fact that the amount of loss, as found by the jury, is less than that stated by the insured in his preliminary proof, is not sufficient to sustain the defence of false swearing,⁶ even though the discrepancy be so considerable as to amount to two-fifths;⁷ though such a discrepancy would be evidence bearing upon such issue, which the insured would be called upon to explain.⁸ But in

¹ *Kimball v. Hamilton Ins. Co.*, 8 Bosw. (N. Y. Superior Ct.) 495.

² *Tootey v. Railway Passenger Assurance Co.*, U. S. C. Ct., Southern Dist. Ill., 2 Ins. L. J. 276.

³ *Hodgkins v. Mont. County Mut. Ins. Co.*, 34 Barb. (N. Y.) 213.

⁴ *Moadinger v. Mechanics' Mut. Ins. Co.*, 2 Hall (Superior Ct. N. Y.), 490; *Marion v. Great Rep. Ins. Co.*, 35 Mo. 148; *Franklin Fire Ins. Co. v. Updegraff*, 43 Penn. St. 350; *Park v. Phoenix Ins. Co.*, 19 Upper Canada (Q. B.), 110.

⁵ *Per Cockburn, C. J.*, *Nisi Prius*, *Chapman v. Pole*, 22 L. T. N. S. 307.

⁶ *Franklin Ins. Co. v. Culver*, 6 Ind. 137.

⁷ *Moore v. Prot. Ins. Co.*, 2 Me. 77.

⁸ *Hoffman v. West. Mar. Fire Ins. Co.*, 1 La. An. 216; *Marchesseau v. Merchants' Ins. Co.*, 1 Rob. (La.) 438.

Levy v. Baillie,¹ a rule *nisi* for a new trial was made absolute where the claim sworn to was £1,085, and the amount found by the jury was £500, on the ground that that was in effect a verdict for the defendant under the condition. And if the sworn statement discloses a ground of defence for the insurer, he may avail himself of it, and the insurer will be bound by his statement at the trial, unless an amended statement is furnished to the insurers before that time.² And if payment of the loss be obtained by means of fraudulent proofs, the money may be recovered back in an action for the deceit. In such an action it was ruled that the defendants might be held liable, even though the plaintiffs did not rely exclusively upon their statements, but were partly induced by other statements or proofs to make the payment. It is sufficient, upon this point, "if the plaintiffs so far relied on these statements (of the defendants) that they would not have paid the money had it not been for these statements." If the representations of the defendants were calculated and intended to induce the plaintiffs to alter their condition by parting with their money, and had that effect, it would be immaterial that other representations and influences were also brought to bear, which may have had a tendency towards the same general results.³

¹ 7 Bing. 349.

² Campbell v. Charter Oak Fire Ins. Co., 10 Allen (Mass.), 213; Irving v. Excelsior Fire Ins. Co., 1 Bosw. (N. Y. Superior Ct.) 507.

³ Hartford Live Stock Ins. Co. v. Mathews and another, 102 Mass. 221.

NOTE. — Since this chapter was printed, the cases of *France v. Ætna Life Ins. Co.* and *Same to use of Selvage v. Same*, tried in the United States Circuit Court for the Eastern District of Pennsylvania, before Cadwalader, J., have come to hand, in which the following points arose, and were decided as stated in the syllabus of the cases. 2 Ins. L. J. 657.

The defendant issued two policies upon the life of the deceased, for the benefit of his sister, one of the plaintiffs, who paid the premiums. At the time the policies were issued, and afterward, until the death of the assured, the sister was a married woman, and in no respect dependent upon her brother, nor was he in any way indebted to her.

Held, that if the deceased, at the time of the insurance, was unmarried and without issue or parent living, the insurance for the benefit of his sister was valid, if the risk insured was properly described in the policies.

The policies each contained a clause providing that the proposal, answers, and

declaration in the application should be a part of the policy, and that if they were false or fraudulent, the policy should be void.

Held, that the clause in the policies made the answers to the questions part of the contract, and that they thus had the effect of warranties, and that if they were wholly or in any material respect false or fraudulent, the plaintiffs could not recover; and that by the expression "in any material respect," the court must be understood as meaning in any respect or degree material to the risk insured, whether as to age or health, or otherwise howsoever.

The deceased, in answer to a question in the application as to whether he had ever had any of certain specified diseases, among which was rupture, answered, "None."

Held, that if he was ruptured at the time, or at any such previous period that the rupture may have been material to any question of the soundness of his health, when his life was insured, or if, at that time or within such period, he wore a truss in order that it might repress hernial extrusion, the verdict should be for the defendant.

The deceased, in answer to questions in his applications, stated that his age was thirty years.

Held, that if the answers to the questions were materially untrue as to the age of the applicant, the policies are void, and that if he was thirty-seven, or even thirty-five years old, the difference was not immaterial.

Held, that if the policy had been assigned by the beneficiary to Selvage, before the death of the assured, as security for a loan, the defendants could not be estopped from denying their liability as to the amount of the loan, by any thing alleged to have occurred after the death of the assured.

If the agent was the agent of the defendant to receive preliminary proofs, and having received them, knew that Selvage was negotiating with the beneficiary for the purchase of the policy, and by representing to him that the insurance would be paid, induced him to buy it, and if what passed between them was mutually understood and intended as a waiver of any such objections as have been made on this trial, the plaintiffs may recover, although the policy would otherwise have been void, for the reasons stated in the objections. Verdict in first case for defendant; in second, for plaintiffs.

There was an intimation from the learned judge that his ruling on the third point was too favorable for the plaintiffs; and the ground upon which he refused to rule that there could be no insurable interest in such a case may be inferred from the following observation immediately following the ruling above stated: "There are persons who may be described as presumptively next of kin, and who can insure the lives of their relatives."

CHAPTER XXI.

OF LIMITATION OF SUIT AS TO TIME AND PLACE. ARBITRATION.

§ 478. **Limitation as to Time — From Loss.** — A condition in a policy of fire insurance, that no action against the insurers for the recovery of any claim upon the policy shall be sustained, unless commenced within a certain period after the loss shall have occurred, and that the lapse of this period shall be conclusive evidence against the validity of any claim asserted, if an action for its enforcement be subsequently commenced, is valid, and is not in contravention of the policy of statutes of limitation. It stands upon the same grounds as other conditions precedent.

There is no principle of common law forbidding such a condition. Originally there was no limitation to actions. The first statute of limitations, which has been substantially followed, provided that suits in certain cases should be brought within six years, and not afterwards. But there is nothing in the act which forbids a limitation short of this period, by agreement of parties. It only prohibits the suit after six years. There can be no doubt that, prior to the statute, it would have been competent for the parties, by a clause in their contract, to limit the time within which suit might be brought. There is nothing in the act, necessarily or by fair construction, taking away the right. And the adoption of such a condition is based upon grounds of prudence and policy which must challenge the general approval. Insurance companies are always liable to be imposed upon by fraud. It is often very difficult to detect the fraud, and to obtain evidence to substantiate it in a court of justice; and the greater the lapse of time the greater the difficulty. It is therefore a wise and provident precaution to take, — one which the law ought, if possible, to uphold, — to limit, by the terms of their policies,

the time within which actions shall be brought, as a necessary protection to themselves against fraud ; and they have the same right to introduce such a stipulation as to introduce any other.¹ Even language less explicit, as that the insured may bring his action within a limited time, has been held to bar an action brought after that time.² And the limitation, being part of the contract, applies whatever may be the form of the suit.³

§ 479. **Limitation — From Time when Loss becomes Due — From Proof.** — In some cases it is provided that a suit is not to be brought until the expiration of a certain time after the loss becomes due ; and it has been held that where a loss, subject to such provision, was allowed, payable in sixty days, suit brought therefor two months after the allowance was properly brought. The demand is due from and after the determination of the amount or allowance. It is payable at the expiration of the time limited. That it is not due till the expiration of the time limited for the payment is not the correct interpretation ; after the allowance it is *debitum in presenti, solvendum in futuro*.⁴ If the policy provides that suit shall be brought within a certain time after the “ loss or damage shall occur and become due,” and further provides that the payment of losses shall be made in ninety days after proofs shall be

¹ Ketchum v. Prot. Ins. Co., 1 Allen (New Brunswick), 136 ; Amesbury et al. v. Bowditch Mut. Fire Ins. Co., 6 Gray (Mass.), 596 ; Riddlesbarger v. Hartford Ins. Co., 7 Wall. ¶ U. S.), 386 ; Cray v. Same, 1 Blatchford (U. S. C. Ct.), 280 ; Brown v. Roger Williams Ins. Co., 7 R. I. 301 ; s. c. 5 R. I. 304 ; Wilson v. Ætna Ins. Co., 27 Vt. 99 ; Williams et al. v. Vermont Mut. Ins. Co., 20 Vt. 222 ; Peoria Ins. Co. v. Whitehill, 25 Ill. 466 ; North Western Ins. Co. v. Phoenix Oil and Candle Co., 31 Penn. St. 449 ; Bruce et ux. v. Savannah Mut. Ins. Co., 24 Geo. 97 ; Portage County Mut. Ins. Co. v. West, 6 Ohio, 599 ; Carter v. Humbolt Fire Ins. Co., 12 Iowa, 287 ; Stout v. City Fire Ins. Co., ib. 371 ; Ripley v. Ætna Ins. Co., 29 Barb. (N. Y.) 552 ; Fullam v. New York Union Ins. Co., 7 Gray (Mass.), 61. The case in the Supreme Court of Indiana, Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 443, rested upon French v. Lafayette Ins. Co., 5 McLean, 461, which has been overruled by the case cited above from 7 Wallace (U. S. Sup. Ct.), 386. See also Ripley v. Ætna Ins. Co., 30 N. Y. 136 ; Brown v. Hartford Ins. Co., 5 R. I. 394 ; Hickey v. Anchor Ass. Co., 18 Upper Canada (Q. B.), 403 ; Patrick v. Farmers' Ins. Co., 43 N. H. 621 ; Roach v. New York and Erie Ins. Co., 30 N. Y. 546 ; Woodbury Sav. Bank v. Charter Oak Ins. Co., 31 Conn. 518.

² Portage County Mut. Fire Ins. Co. v. West et al., 6 Ohio, n. s. 599.

³ Fullam v. New York Union Ins. Co., 7 Gray (Mass.), 61.

⁴ Utica Ins. Co. v. American Mut. Ins. Co., 16 Barb. 171.

received at the office of the company, the proofs having been furnished with due diligence, the time limited for bringing suit will begin to run at the expiration of the ninety days.¹

§ 480. **Limitation — Execution.** — And a like provision, with reference to the levy of an execution for similar reasons, is also valid. And the provision of the charter of a mutual fire insurance company that no execution shall issue upon any judgment obtained against them until three months after the rendition thereof, will be enforced, though the judgment upon which the execution is sought to be enforced be founded upon a foreign judgment rendered long before. The provision of the charter becomes a constituent part of the contract between the parties, and the analogy between a stipulation not to bring suit within or after the expiration of a certain period, and a stipulation not to levy execution, is sufficient to warrant the court in ordering a stay of execution.²

§ 481. **Limitation — Reinsurance.** — Reinsurance, under a policy which stipulates that suit shall be brought within a limited time after any loss or damage shall occur, expires at the expiration of the time limited after the loss of the property by the peril insured against, and not after the payment by the reinsured of the loss. The payment by him, though in one sense a loss to him, is not the loss or damage referred to in the policy of reinsurance.³

§ 482. **Limitation — Avoidance — New Promise.** — And a new promise or acknowledgment will not revive such a cause of action. If the prescribed time be suffered to elapse without suit, there remains no longer a legal liability in any form. There is no indebtedness which, though by the operation of the statute incapable of being enforced by suit, may nevertheless be reanimated and invested with that quality by an acknowledgment or new promise. The contract is of a peculiar description, resembling a wagering contract, in which the insurers, for a small premium, undertake to indemnify the party who suffers

¹ Longhurst v. Conway Fire Ins. Co., U. S. D. Ct., Iowa, 1861, cited in Clarke's Digest of Fire Insurance Cases.

² Judkins v. Union Mut. Fire Ins. Co., 39 N. H. 172.

³ Prov. Ins. Co. v. Ætna Ins. Co., 16 Upper Canada (Q. B.), 105.

the loss. The amount for which they may become responsible greatly exceeds the premium paid ; and the liability depends upon a contingency over which neither party has any control. For whatever the insurers may eventually have to pay, they become liable by positive stipulation rather than upon any principle of natural justice growing out of an adequate consideration received. So far as this liability exceeds the premium paid, it more nearly resembles a penalty than a simple debt, and thus would more naturally fall into the class of cases in which statutes, prescribing a time within which suits shall be brought, are construed as limitations upon the liability rather than mere denials of a remedy.¹ It was intimated in *Brown et ux. v. Savannah Mutual Insurance Company*,² that such a limitation might not be upheld if the period within which suit must be brought be so unreasonable as to raise a presumption of imposition or undue advantage in some way.

§ 483. Nor can such suit, brought after the expiration of the time limited, although a prior suit commenced within the limited period may have been non-suited, or judgment thereon arrested, be maintained. The condition is without exception, and the exceptions of statutes of limitations cannot be imported into it by the court.³

§ 484. **Limitation — Excuse — Absence of Defendant.** — Perhaps, however, the doctrine of the last case should be taken with the qualification that the failure of the first suit is not imputable to the fault of the insurers. Such seems to have been the view taken in a case in Michigan, where suit was brought thirteen days before the expiration of the time limited. The writ was immediately placed in the hands of the officer, who made return that he could not find the defendant. Thereupon the next day, which was two days after the expiration of the time limited, another summons was issued, with which the defendant was served. The limitation in this case was in the contract, and not in the charter of the company. The

¹ *Williams et al. v. Vermont Mut. Ins. Co.*, 20 Vt. 222.

² 24 Geo. 97. And see Angell on Limitations, 5th ed. p. 16, note.

³ *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. (U. S.) 386; *Brown v. Roger Williams Ins. Co.*, 7 R. I. 301; *Wilson v. Aetna Ins. Co. of New York*, 27 Vt. 99.

court, without stopping to consider whether the issue of the second summons was, or was not, a continuation of the suit, sustained the action. It appeared to them to have been the fault of the defendant—the absence of their agent—that the first summons was not served, and the action commenced within the limited period; and this was sufficient to defeat the limitation, or extend it till the service was made under the second summons, which was issued immediately on the return of the first. While a limitation by statute is arbitrary and peremptory, admitting of no excuse beyond the period fixed, a limitation by contract must, upon the principles governing contracts, be more flexible in its nature, and liable to be defeated or extended by any act of the defendant which prevents the plaintiff from bringing his action within the prescribed period. And the fundamental idea, the tacit condition upon which such a limitation must rest, and without which it could not be tolerated for a moment, is, that the defendant shall be accessible to the service of process by which suit may be commenced against him, if not for the whole period, at least for a sufficient time immediately preceding its close to enable the plaintiff to commence suit by the service of process in the ordinary legal mode. If this be not so, then it follows that the defendant could take advantage of his own wrong, and, by absenting himself entirely, defeat the plaintiff's right of action.¹ But this importation into the contract of the exception of absence, after the analogy of statutes of limitations, has not elsewhere met with approbation.² In the last cited case, however, no attempt had been made to bring the action within the limited period, for the alleged reason that the action could not have been maintained unless the defendant had voluntarily appeared, and there was no means of compelling an appearance; and perhaps the observation of the court, that nevertheless the plaintiff might have sued out process within the limited period, is indicative that, had this been done, the result would have been different.

§ 485. Limitation — Excuse — Pending Negotiations. — Nor

¹ *Peoria Mar. and Fire Ins. Co. v. Hall*, 12 Mich. 202.

² *Ketchum v. Prot. Ins. Co.*, 1 Allen (New Brunswick), 136.

will the operation of such a limitation be suspended or prevented by negotiations for a settlement, as by a reference pending between the parties, if there be no agreement for delay, and the defendant has done nothing to mislead the plaintiff.¹

§ 486. **Limitation — Excuse — Effect of War.**— Where by the terms of the policy suit is to be brought within twelve months after loss, and to a suit brought after that time the lapse of time shall be deemed conclusive evidence against the validity of the claim; and insured was prevented by the intervention of war from bringing his suit within twelve months after the loss, the court held that war having rendered compliance with this condition impossible, the presumption from the lapse of time was destroyed, and did not revive, and that the insured might bring his suit at any period within the statute of limitations, without regard to the fact whether twelve months of peace within which he might have brought his suit had elapsed.²

§ 487. **Limitation — Excuse — Inconsistent Conditions.**— And where the other conditions are such that a reasonable compliance with them is inconsistent with a compliance with the condition requiring suit to be brought within a specified time, the latter will not be allowed to defeat a recovery. Thus where suit is to be brought within six months from the time of the loss, and the loss is not payable until sixty days after the adjustment, and the parties, in good faith and without objection, are occupied so long in adjusting the loss that sixty days from the date of the adjustment does not expire within the six months, a suit brought at the expiration of sixty days will be sustained.³ So where the insurable interest was a mechanic's lien, the value of which could only be determined by a judgment of court upon suit, which was brought immediately upon the occurrence of the loss, but did not come to judgment till after the expiration of the time

¹ Gooden v. Amoskeag Fire Ins. Co., 20 N. H. 73.

² Semmes v. City Fire Ins. Co. of Hartford, 13 Wall. (U. S.) 159, reversing s. c. 6 Blatchf. (C. Ct. U. S.) 445; Lynchburgh Hose Fire Ins. Co. v. Knox, *ante*, § 39, note; Hillyard v. Mut. Ben. Life Ins. Co., Sup. Ct. N. J., 1872, 2 Ins. L. J. 137.

³ Mayor, &c., of New York v. Hamilton Fire Ins. Co., 10 Bosw. (N. Y.) 537.

limited for bringing suit for the loss, it being also stipulated that proof of the value of the loss must be made before it could be demanded, it was held that the limitation of the suit was inoperative.¹ The insurers, in issuing a policy upon a mechanic's lien, must be presumed to issue it subject to the unavoidable delay in the judicial ascertainment of the value of the interest if a loss should occur. If, with reasonable diligence, that value cannot be legally ascertained in time to bring an action on the policy within the limited period, it follows either that there is a dishonest purpose on the part of the company in inserting such a condition, or else they intend in such case to waive it, or treat it as wholly inapplicable and nugatory.² Nor will a collateral suit brought after the expiration of the limited time in aid of a suit at law brought within the limited time, be barred; as where a bill in equity is brought to reform a policy. Had there been no suit at law pending, a bill in equity for relief would have been barred.³ And if the insurers refuse to issue a policy, and a bill in equity to enforce the agreement to issue it be filed, they cannot avail themselves of such a limitation as applicable to the bill in equity.⁴

§ 488. **Limitation — Waiver.** — But this condition, like all others intended for the benefit of the insurers, may be waived by them; and as the condition is a harsh one in its bearing on the insured, and works a forfeiture when upheld, the courts will not require very stringent evidence in order to defeat its application. A positive act of the company intended to induce postponement is not necessary. And where the evidence upon this point is conflicting, waiver is a question of fact for the jury.⁵ Mere silence, however, is no waiver,⁶ though it may

¹ *Stout v. City Fire Ins. Co. of New Haven*, 12 Iowa, 371.

² *Longhurst v. Star Ins. Co.*, 19 Iowa, 364.

³ *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 518.

⁴ *Penley v. Beacon Ins. Co.*, 7 Grant (Canada), 130.

⁵ *Ripley v. Aetna Ins. Co.*, 29 Barb. (N. Y.) 552; *Coursin v. Penn. Ins. Co.*, 46 Penn. St. 323; *Ketchum v. Prot. Ins. Co.*, 1 Allen (N. B.), 136; *Columbian Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 25; *Graves v. Washington Mar. Ins. Co.*, 12 Allen (Mass.), 391.

⁶ *Ante*, § 464. *Schroeder v. Kingston Ins. Co.*, 2 Phila. 286; s. c. Leg. Int. 14, 164.

be evidence thereof to go to a jury ;¹ nor are loose conversations about a settlement ;² nor is a peremptory refusal to pay, though on the ground that actions have been brought by other parties, and nothing will be done towards payment while such actions are pending, a waiver of the right to insist upon the limitation. The insured is not misled thereby, nor is he expressly or impliedly requested to delay by the insurer.³ Nor, as we have just seen,⁴ is the mere pending of negotiations in good faith. If, however, they are not prosecuted in good faith, or are made the occasion of delay, — a result to which the insurers mainly contribute by holding out hopes of an amicable adjustment whereby the insured is led to feel a false security, this is a waiver.⁵ So, if the delay for any cause be attributable to the insurers, and the insured be not in fault. Thus in *Ames v. New York Union Insurance Company*,⁶ where the policy provided that suit must be brought within six months from the day of the loss, and that the insurers should have ninety days after proofs were furnished within which to pay, the proofs of loss were delivered to the defendants some nine days after the fire. They were then retained, without objection, for eighty-five days, when suggestion was made by the insurers that further proof was necessary, which further proof was furnished in seven days more. No further objections were made. By the delay, however, the time within which the plaintiff had a right to demand payment did not arrive till after the time limited for bringing suit. The defendants had thereby secured an extension of time within which to pay the loss, and put it out of the power of the plaintiff to successfully maintain a suit commenced within six months after the loss occurred. To the same effect is *Curtis v. Home Insur-*

¹ *Ripley v. Ætna Ins. Co.*, 29 Barb. (N. Y.) 552.

² *Ripley v. Ætna Ins. Co.*, 30 N. Y. 136 ; *Lambkin v. West. Ass. Co.*, 13 Upper Canada (Q. B.), 237.

³ *Ripley v. Ætna Ins. Co.*, 30 N. Y. 136.

⁴ *Ante*, § 485.

⁵ *Mickey v. Burlington Ins. Co.*, Sup. Ct. Iowa, 2 Ins. L. J. 15 ; *Grant v. Lexington Fire, Life, and Mar. Ins. Co.*, 5 Ind. 26 ; *Fullam v. New York Union Ins. Co.*, 7 Gray (Mass.), 61 ; *Black v. Winnesheik Ins. Co.*, Sup. Ct. Wis. 1 Ins. L. J. 11.

⁶ 14 N. Y. 254.

ance Company,¹ where it is said that if the conduct of the insurers during the negotiations is such that the insured may reasonably believe that they intend to pay them, delay is excusable; otherwise not.

§ 489. **Limitation — Suit.** — “Suit” to recover a claim by virtue of the policy, means any proceeding in a court for the purpose of reaching and getting possession of the loss which may be found to be payable, under whatever mode the law permits. A creditor, for instance, of the person who suffers the loss may proceed by trustee process or foreign attachment, and under this try the question* of the liability of the insurers to the insured. And such suit, if brought within the time limited, is a compliance with the condition.² Of course the creditor would, in such case, have no greater rights than his debtor; and if the debtor has failed to comply with a condition precedent to his right, as, for instance, to submit to examination on oath, when so required, his creditor cannot recover. That the debtor received no actual notice of the requirement, will not help the creditor, if the insurers make reasonable efforts to notify him. If the want of notice were attributable to the negligence of the insurers, it might be otherwise. A failure, on their part, to notify within reasonable time might be deemed a waiver of the condition.³

§ 490. **Limitation as to Place.** — A condition in the contract limiting the venue or place where the action shall be brought, is invalid. There is an obvious distinction between a stipulation by contract as to the time when a right of action shall accrue or be lost, on the one hand, and a stipulation as to the forum before which, and the proceedings by which, an action shall be commenced and prosecuted, on the other. The one is a condition annexed to the acquisition and continuance of a legal right, and depends on contract and the acts of the parties; the other is a stipulation concerning the remedy which is created and regulated by law. The time within which money shall be paid is matter of contract, depending on the will and acts of the parties; but, in case of breach, the tribunal before which

¹ 1 Bissell (C. Ct. U. S.), 435.

² Harris v. Phoenix Ins. Co., 35 Conn. 310.

³ Ibid.

a remedy is to be sought, the means and processes by which it is to be conducted, affect the remedy, and are created and regulated by law. The remedy does not depend on contract, but upon law, generally the *lex fori*, regardless of the *lex loci contractus*, which regulates the construction and legal effect of the contract. It is, moreover, a well-settled maxim that parties cannot, by their consent, give jurisdiction to courts, and it would seem to follow that parties cannot take away jurisdiction where the law has given it. And mutual and stock companies are equally under the disability.¹ Upon the same general grounds an agreement not to sue, except in a particular State, will not defeat an action on the policy in a different State. Such an agreement is against public policy.² It is also against the statute of Missouri.³ If the venue be fixed by the terms of the charter, a subsequent act of the legislature changing the venue and extending the right to sue in counties where there is an agency of the insurers is valid, as affecting only the remedy.⁴

§ 491. **Limitation — Strictly construed.** — But the limitation as to venue and as to time will be strictly construed and confined to the exact case stated in the charter or contract. Thus, where the charter provides that after a loss the directors shall proceed and determine the amount, and if the party suffering is not satisfied with the determination, he may bring his action at a particular court; if the directors repudiate the claim altogether, the party suffering may sue in any court open to him by the general provisions of law. The limitation can only be supported in the special case provided for.⁵ The reasons for the distinction are obvious. So far as the claim for insurance is disputed, and may be a subject of litigation between the parties,

¹ *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray (Mass.), 174; *Hall v. People's Mut. Fire Ins. Co.*, 6 Gray (Mass.), 185; *Amesbury et al. v. Bowditch Mut. Fire Ins. Co.*, 6 Gray (Mass.), 596.

² *Reichard v. Manhattan Life Ins. Co.*, 31 Mo. 518.

³ Rev. Code, 884.

⁴ *Howard v. Kentucky and Louisville Mut. Ins. Co.*, 13 B. Mon. (Ky.) 282; *Sanders v. Hillsborough Ins. Co.*, 44 N. H. 238.

⁵ *Williams v. Columbian Mut. Ins. Co.*, 29 Me. 465; *Boynton et al. v. Middlesex Mut. Fire Ins. Co.*, 4 Met. (Mass.) 212; *Martin v. Penobscot Mut. Fire Ins. Co.*, 53 Me. 419.

the insurers may well provide in their by-laws that an action shall be speedily brought, so that the extent of their liability may be settled while the facts are recent, and the witnesses by whom they are to be proved are readily accessible. But there is no such reason for the limitation of the time within which a suit shall be brought, when it is sought to recover only the amount under the policy, which has been ascertained and admitted to be justly due by the insurers.¹ In the case last cited, the distinction adverted to in *St. Louis Insurance Company v. Kyle*,² that there could be no waiver of notice, while there might be of preliminary proof, is declared not to be well founded. It has been held, however, in Ohio, that, although the insurers neglect to ascertain and determine the loss, under a policy that provides that an action shall be brought in a certain county if the insured shall not be satisfied, the action must be brought in the county named. The statute of that State, however, provides that suits on policies of insurance may be brought in any county where the contract is made, except in cases where the policies are issued by companies whose charters specify the county in which suit shall be brought.³ And in *Dutton v. Vermont Mutual Fire Insurance Company*,⁴ it is held, contrary to the almost uniform current of authorities, that a refusal to pay a claim is a determination and ascertainment, within the meaning of such a condition, and consequently no action can be maintained except as provided in the policy. No reference by court or counsel is made to any of the decisions to the contrary.

§ 492. *Arbitration — Agreement to refer generally invalid.* — Not unfrequently policies contain a stipulation, that in case of loss, and the parties cannot agree upon the terms of adjustment, all matters in dispute shall be submitted to arbitration,

¹ *Amesbury et al. v. Bowditch Mut. Fire Ins. Co.*, 6 Gray (Mass.), 608; *Bartlett v. Union Mut. Fire Ins. Co.*, 46 Me. 500; *Nevins v. Rockingham Fire Ins. Co.*, 5 Fost. (N. H.) 22; *Indiana Mut. Fire Ins. Co. v. Routledge*, 7 Ind. 25; *Phillips v. Prot. Ins. Co.*, 14 Mo. 220.

² 11 Mo. 278.

³ *Portage County Mut. Ins. Co. v. Stukey*, 18 Ohio, 455. This decision seems to rest upon the peculiarity of the general statute.

⁴ 17 Vt. 369.

— a practice which may be traced almost to the infancy of insurance, and originated no doubt in a laudable desire to avoid the vexation, delay, and expense of litigation. It has not, however, proved so effectual for that purpose as was anticipated, since the courts have very uniformly deemed the stipulation to have no binding force. It plainly tends to oust them of their jurisdiction, and they will not specifically enforce the agreement.¹ Of course, if the parties consent or prefer to adjust their disputes in this way, the courts will not interfere to prevent. On the contrary, such a course will be encouraged; and if arbitration be resorted to, and proceed to an award, the award will be recognized as a good plea in bar to an action on the policy.² And so where there has been an actual submission, and the reference is still pending.³ And the courts will enforce the award.³ But neither a provision enabling the parties to submit matters in controversy to arbitration, nor a covenant so to do, will prevent the courts from taking their rightful jurisdiction in the premises. All such agreements have for their purpose the substitution of a tribunal, erected by the parties, for the tribunal which public policy and the general laws have established and clothed with the requisite powers to make them the efficient and, upon the whole, the best means of hearing and determining controversies between individuals. If the stipulation were to be held valid, the courts might be called upon to enforce it. The dispute would thus come to them at last, and they have preferred to ignore the validity of the stipulation and to refuse to enforce it, rather than permit themselves to be occupied with the somewhat ludicrous question whether parties may come into court for the purpose of compelling each other to keep out.⁵ In Louisiana, it has been intimated that the agreement to refer would be upheld if

¹ *Thompson v. Charnock*, 8 T. R. 139; *Goldstone v. Osborne*, 2 C. & P. 550.

² *Roper v. Lendon*, 1 El. & El. (Q. B.) 825; 102 E. C. L.; *Burchell v. Marsh*, 17 How. (U. S.) 344.

³ *Kill v. Hollister*, 1 Wilson, 129.

⁴ *Richardson v. Suffolk Ins. Co.*, 3 Met. (Mass.) 573; *Hughes v. Mut. Fire Ins. Co. of New Castle*, 9 Upper Canada (Q. B.), 387.

⁵ *Kill v. Hollister*, 1 Wilson, 129; *Scott v. Avery*, 20 Eng. L. & Eq. 327; s. c. 5 H. L. C. 811; *Scott v. The Phenix Ass. Co.*, 1 Stuart (Lower Canada), 152.

insisted upon. But the point was not directly before the court, the court holding that the insurers, having refused to pay, without invoking this article, had waived the right to set it up in bar of the action.¹

§ 493. *Arbitration — Agreement to refer special Matter valid.* — While, however, it is perfectly well settled that any agreement that contemplates the exclusion of an aggrieved party from a suit of law is invalid, there seems to be no doubt that any agreement as to the mode of settling the amount of loss, or the time for paying it, or any particulars of that nature which do not go to the root of the action, but are preliminary thereto or in aid thereof, as, for instance, an agreement that at the trial of an action it shall not be lawful for either party to enter into the question of the amount of the loss, but that it shall always be settled by reference, and that the only question to be tried at law shall be the right to recover, is valid. A distinction is made between an agreement to refer every matter in dispute to arbitration, and one to pay such a sum as the damage shall be found by a third party to amount to, which latter operates to reduce the policy from a contract to pay the amount of damage absolutely, and to substitute the arbitrator for the jury to ascertain its amount.² The following condition is common in English policies, and is believed to be valid : —

“ If any difference shall arise in the adjustment of a loss, the amount (if any) to be paid by the company shall, whether the right to recover on the policy be disputed or not, and independently of all other questions, be submitted to the arbitration of some person, to be chosen by both parties, or of two indifferent persons, one to be chosen by the party insured, and the other by the directors. And in case either party shall refuse or neglect to appoint an arbitrator within twenty-eight days after notice, the other party shall appoint both arbitrators ; and in case of the arbitrators differing therein, the amount shall be submitted to the arbitration of an umpire, to be chosen

¹ *Millaudon v. Atlantic Ins. Co.*, 8 La. 557.

² *Scott v. Avery*, 20 Eng. L. & Eq. 327 ; s. c. 5 H. L. C. 811 ; *Braunstein v. Accidental Death Ass. Co.*, 1 B. & S. 782 ; *Tredwen v. Holman*, 1 H. & C. 72 ; *Lowndes v. Stamford*, 18 Q. B. 425 ; *Trott v. City Ins. Co.*, 1 Cliff. (C. Ct. U. S.) 439.

by the arbitrators before they proceed to act, and the award of the arbitrators or umpire (as the case may be) shall be conclusive evidence of the amount of the loss, and the party insured shall not be entitled to commence or maintain any action at law or suit in equity upon his policy, until the amount of the loss shall have been referred and determined as herein-before provided, and then only for the amount so awarded. Each party to pay his or their own costs of the reference, and a moiety of the costs of the award, and of the arbitrators and umpire; and the reference, in all other respects, to be subject to such rules and conditions as are usually inserted in orders of reference at *Nisi Prius*, if the parties differ about the same.”¹ In *Goldstone v. Osborne*,² the agreement was, that if any difference should arise on any claim, it should be submitted to arbitration, and that no compensation shall be payable until after an award determining its amount. But, it appearing that the insurers disputed the right of the plaintiff to recover any thing, Best, C. J., allowed the action to go on, although there had been no reference as to the amount of loss.³

§ 494. Arbitration — Provision for in Act of Incorporation. — If, by the terms of the act of incorporation, arbitration be provided for in such a manner as to indicate that it was the intention of the legislature to erect such a tribunal for the benefit of the parties, and to compel a resort to arbitration in the first instance, before appealing to the courts, then the courts would not entertain a suit until such arbitration had been had.⁴ The question has undergone further elaborate consideration in the recent case of *Elliott v. Royal Exchange Insurance Company*,⁵ where the discussion turned upon the point whether the form of the provision in question was such as to amount to a condition precedent, or only to a collateral stipulation. If the former, then it was valid; if the latter, then it was of no avail. The facts were, so far as they do not appear in the opinion of

¹ Law of Fire Insurance, Bunyon, 108.

² 2 C. & P. 550.

³ See also *Millaudon v. Atlantic Ins. Co.*, 8 La. 557.

⁴ *Reeves v. White*, 10 Eng. L. & Eq. 332; *Crisp v. Bunbury*, 8 Bing. 394; *Ex parte Payne*, 5 Dowl. & L. P. C. 679.

⁵ 2 L. Rep. (Exch.) 237.

the court, that the policy, which was under seal, in one of its articles provided that "the loss or damages, after the same shall be adjusted, shall immediately be paid," and that "in case any difference shall arise touching any loss or damage, such difference shall be submitted" to arbitrators, whose award in writing shall be conclusive and binding on the parties. The covenant was to pay according to the exact tenor of the articles subjoined to the policy. Upon this policy an action was brought, and the defendants replied that a difference arose between them and the plaintiff, which the plaintiff refused to submit to arbitration. The majority of the court concurred with Kelly, C. B., who said : —

"The question in this case is, whether the plaintiff is entitled to recover the amount of a loss by fire, which he has suffered, and for which he claims to be compensated under a policy effected by the defendants, such loss not having been adjusted as pointed out in the articles, subject to which the policy was made. The form of the policy is a covenant by the defendants that their capital, stock, &c., shall be subject to make good the plaintiff's loss, £2,200, 'according to the exact tenor of the articles thereunto subjoined.' If the sentence had stopped at the figures £2,200, and in a subsequent part of the instrument there had been independent provisions, which might be supposed to have qualified these words, it might have been a question of greater doubt whether these provisions were to be held a condition precedent or a collateral stipulation, which could not avail to oust the jurisdiction of the court. But the covenant is itself, in its very terms, qualified and made conditional by the subsequent words referring to the articles, which, following without any interval, form an integral and substantial part of the covenant. Therefore, in order to ascertain whether, when a loss has been sustained by the insured, a right of action has accrued to him, we must look at the articles, 'according to the exact tenor' of which the insurance is to be paid. Now the 10th article provides that upon the occurrence of any loss or damage by fire, the party is forthwith to give notice to the officers, and within fifteen days to deliver in a particular account of his damage, evidenced and verified

as may be required, 'which loss or damage, after the same shall be adjusted, shall immediately be paid in money,' with an option to the company to reinstate. Collecting the meaning of the parties from the language used by them in this sentence, and putting on it the ordinary and usual construction, the effect is, not that the plaintiff is, in the event of loss, entitled immediately to recover the amount of his loss, but what he is entitled to recover is the amount of the loss after it has been adjusted, which means adjusted in the manner pointed out by the subsequent articles. It appears to me that to decide to the contrary would be to disregard entirely the obvious intentions of the parties, expressed in words, which state emphatically that before the loss is paid its amount shall be adjusted.

"We were pressed with the weight of authority, and it was ably argued that it is impossible to decide in favor of the defendants, consistently with prior decisions, and with the well-recognized principle that no contract shall oust the jurisdiction of the courts of law; and it was urged that the contract was neither more nor less than a contract on the part of the company to make good the loss, with a separate and collateral stipulation that the amount shall be referred to arbitration. It is no doubt difficult to reconcile and give effect to two propositions so nearly in direct opposition, as that no contract of the parties shall oust the jurisdiction of the courts, and that on any difference arising between two parties, it shall be referred to arbitration. But the fair result of the authorities is that, if the contract is in such terms that a reference to a third person, or to a board of directors, is a condition precedent to the right of the party to maintain an action, then he is not entitled to maintain it until that condition is complied with; but if, on the other hand, the contract is to pay for the loss (or other matter in question), with a subsequent contract to refer the matter to arbitration, contained in a distinct clause, collateral to the other, then that contract for reference shall not oust the jurisdiction of the courts, or deprive the party of his action. Now it seems to me impossible, without directly overruling or disregarding the decision of the House of Lords, in *Scott v.*

Avery,¹ to say that the stipulation here is not a condition precedent. There the words were that 'the sum to be paid by this association to any suffering member for any loss or damage shall, *in the first instance*, be ascertained by the committee.' Here they are 'that the loss, *after the same shall be adjusted*, shall immediately be paid.' In both cases a stipulation follows that any difference arising between the parties shall be referred to arbitration. The House of Lords, in that case, having held that the ascertainment of the loss by the committee or by arbitration was a condition precedent, and that without such ascertainment the plaintiff had no cause of action, I cannot see any distinction which would justify us in holding here that the adjustment of the loss, as provided in the articles, was not a condition precedent. All the cases cited were in favor of the defendant's contention, with the exception of *Horton v. Sayer*² and *Roper v. Lendon*,³ which were both decided on the ground that the agreement to refer was only a collateral stipulation. In the latter case, the court came to that decision on a contract very much resembling the present one. I do not enter into the question whether the true construction was put on the instrument in that case; the point seems to have been given up early in the argument, and the matter was hardly discussed. But on another part of the same contract, words contained in one of several conditions, subject to which the policy was made, were held to constitute a condition precedent; and that part of the decision rather supports our present judgment. This contract, I think, speaks plainly to the effect I have stated, and my judgment therefore is for the defendants."⁴

Bramwell, J., dissented, not because he differed with his brethren as to the law, but because he thought the provision in question a collateral stipulation and not a condition precedent.⁵

¹ 5 H. L. C. 511.

² 4 H. & N. 64.

³ 1 E. & E. 825.

⁴ *Elliott v. Royal Exchange Ins. Co.*, Law Rep. (2 Exch.) 237.

⁵ The opinion, though a dissenting one, is worth the space we shall be obliged to give it in this note. Bramwell, J.: "I think the plaintiff is entitled to judgment. I agree that there is no doubt as to the law, nor did I ever think there was, even before the decision in *Scott v. Avery*. In the argument of that case (the arbitration clause in which was framed by Mr. Justice Cresswell) Mr. Man-

§ 495. Arbitration — Condition. — In *Campbell v. American Popular Life Insurance Company*,¹ where it was provided that payment of the loss was to be on condition that, in the opinion of the surgeon-general of the company, the insured did not die from "intemperance," while if such was his opinion, then the

isty and myself were counsel for the defendants. We scarcely cited a case, but laid down a proposition which was almost immediately adopted by the judges below and by the House of Lords. That proposition was, that if two persons, whether in the same or in a different deed from that which creates the liability, agree to refer the matter upon which the liability arises to arbitration, that agreement does not take away the right of action. But if the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a third person shall settle the amount, then no cause of action arises until the third person has so assessed the sum. For to say the contrary would be to give the party a different measure or rate of compensation from that for which he has bargained. This is plain common sense, and is what I understand the House of Lords to have decided in *Scott v. Avery*. Now the construction of this policy appears to me far from clear, upon the point whether the defendants agree to pay the adjusted amount, or whether they agree to pay the actual loss, with a provision for adjusting the loss. If the latter is the true construction, then the principle of *Scott v. Avery* does not apply, or rather it applies to exclude them from their defence. The words of the policy are that the defendants will pay to the plaintiff 'any loss or damage by fire,' according to the tenor of the articles. The articles, which are thus part of the covenant, then say, 'which loss or damage, *after* the same shall be adjusted, shall immediately be paid.' To my mind, these words refer not to an essential term of the covenant (which I prefer to the phrase 'condition precedent'), but to the time when the payment is to be made, that is, immediately after the adjustment. This verbal examination may seem critical, but it is called for; for if the adjusted loss only is stipulated to be paid, the consequence will be that if the assured, after the adjustment, discovers that something has been burned which has been *bona fide* omitted from his claim, he will be precluded by this clause from recovering it. But I do not think that it was in the contemplation of the parties to be so irrevocably bound. If not, then the agreement is to pay not the adjusted, but the actual amount, with a proviso for settling the matter in case of dispute. The clause goes on to say that the defendants may, at their option, restore; so that it is not merely their intention to pay the adjusted loss. It is then provided that in case 'any difference shall arise, touching any loss or damage,' it shall be settled by arbitration. Now it is impossible to say that this is merely a substitute for adjustment between the parties, for, under these words, the arbitrator would have power, not merely to adjust the amount that shall be paid, but to determine whether the plaintiff shall have any payment at all, or whether, by reason of non-payment of premiums or of fraud, he has forfeited his right to recover. I think, therefore, that this is a collateral agreement to refer to arbitration, and not an agreement that only the adjusted loss shall be paid."

¹ Supreme Court, Dist. of Columbia, 4 L. Times (U. S. Reports), 6; s. c. 2 Bigelow's Digest of Life and Accident Insurance Cases, 16.

company were to repay all the premiums, with compound interest, the subject came again under consideration, with a result favorable to the validity of the provision as a condition precedent. The court thus stated its views as to the present state of the law: "It is not denied," say the court, "that any mere agreement between the parties that any future differences growing out of their contract shall be decided by arbitrators or referees, thereafter to be chosen, will not be allowed by the court to oust their jurisdiction. But in this branch of the law there exist distinctions which, if carefully observed and followed, will, in our judgment, reconcile the authorities, and produce a beautiful correspondence, where at first view there may appear nothing but a conflict of authorities. The leading case on this question was that of *Kill v. Hollister*,¹ decided in the Court of King's Bench. The following is the condensed and careful opinion in this case: 'This is an action upon a policy of insurance, wherein a clause was inserted that, in case of any loss or dispute about the policy, it should be referred to arbitration; and the plaintiff avers, in his declaration, that there has been no reference. Upon the trial at Guildhall the point was reserved for the consideration of the court, whether this action well laid before reference was had. And by the whole court: If there had been a reference depending, or made and determined, it might have been a bar; but the agreement of the parties cannot oust the court. And as no reference has been nor any is depending, the action is well brought, and the plaintiff must have judgment.' To the same effect are *Thompson v. Charnock*,² *Goldstone v. Osborne*,³ and *Street v. Rigby*,⁴ following a prior decision made by Lord Thurlow, to which may be added *Scott v. Avery*.⁵ These decisions, however, do not apply to an agreement where the parties have actually chosen and named the referee; for in such a case the court say, in *Kill v. Hollister*, the reference might have been pleaded in bar. It is only the imperfect and executory agreement to have a reference entered into hereafter which the court say

¹ 1 Wilson, 129.² 8 T. R. 136.³ 2 C. & P. 550.⁴ 6 Ves. 815.⁵ 8 Exch. 487.

will not oust its jurisdiction. It is because no reference has been agreed upon and settled between the parties, that the agreement is not a bar.¹ An imperfect and executory agreement, such as that referred to, cannot be enforced in equity, for the reason that a court of equity will not and cannot compel the parties to come to an agreement in the choice of referees. . . . If the controversy, therefore, be not in effect actually referred by such an agreement, as it certainly is not, it must remain under the jurisdiction of the court. . . . The effect of these decisions, therefore, is this, and nothing more, that an agreement to refer, which is so imperfect as not to be specifically enforced in equity, and for breach of which nothing but nominal damages can be recovered at law, will not be allowed to oust the courts of jurisdiction, else there will be a failure of justice. . . . But if the contract be drawn in the 'prudential way,' recommended by Lord Eldon,² by inserting a stipulation for liquidated damages, or there be a separate bond to bind the parties by penalty to its performance, the contract must be fulfilled, or the penalty will be enforced." And nowhere, adds the court, "have we been able to find a decision or even a dictum to sustain the doctrine of the court below, . . . that a contract, binding the parties to a reference, was contrary to public policy." This case doubtless well stands on the doctrine upon which the cases of an agreement to procure the certificates of certain persons to certain facts, before action can be brought, are upheld, to wit, on the ground that they are by contract made conditions precedent to the bringing of an action, and are subject to no such objection as is an agreement to refer, which, if held to be valid, cuts off all right of action. Any stipulation, therefore, which merely looks to the require-

¹ With due deference to the learned court, it is suggested that the effect of the decision in *Kill v. Hollister* is not accurately stated. They do not say that an agreement to refer to a particular person would be good. They say only that an agreement to refer will not oust them of their jurisdiction, but intimate that if the agreement had been *acted on*, then it might have been a good plea in bar.

² "There might have been an agreement for liquidated damages to enforce a specific performance, if an action could not produce sufficient damages, or equity would not entertain a bill for specific performance." Per Lord Eldon, *Street v. Rigby*, *ubi supra*.

ment of certain acts to be done or omitted before bringing an action, seems to be valid, since such a stipulation not only does not oust the courts, but obviously contemplates and makes preparation for an appeal to the courts. The distinction between an agreement to do certain things before bringing an action, and an agreement to refer to arbitration, which is tantamount to an agreement not to bring an action, is too obvious to need remark. Any agreement which does not prevent the parties from coming into court will doubtless be sustained.¹

§ 496. *Arbitration — Equitable Adjustment after Forfeiture.* — In *Nightingale v. State Life Insurance Company of Worcester*,² there was a provision in the policy that in case of forfeiture from any cause the party interested should have the benefit of such equitable adjustment as may, from time to time, be provided by the board of directors; and it was held that, whether any such adjustment could be made was entirely in the discretion of the directors, not in any way subject to the control of the court. "It is true," said Ames, C. J., in giving the opinion of the court, "that by the qualifying clause of the condition of forfeiture the executors of the assured would have been entitled to the benefit of any equitable adjustment provided for by existing rules established by the directors, or accorded by their special act. Whether such rules should be established, or such special dispensation from the forfeiture should be granted, was, as it seems to us, left by this qualifying clause wholly to the discretion of the directors, who 'from time to time' might act in the matter; except, indeed, that they should not be permitted to change, to the injury of the assured, an established rule of adjustment, existing at the time of the act or omission, of the forfeiture. The construction which supposes that such discretion was designed by both parties to the contract to be reposed in the directors, as fair arbiters for all interested, borrows support from the fact that, under the charter of this company, the directors are elected by the joint votes of the assured and holders of the guaranty stock, and are to

¹ *Trott v. City Ins. Co.*, 1 Cliff. (C. Ct. U. S.) 439. And see also *ante*, §§ 484, 485.

² 5 R. I. 38.

be chosen, in moieties, out of these two classes of the members of the corporation. No rule of equitable adjustment applicable to the case at bar appears to have been established by the directors of this company, and the request made to them by the claimants for special action in their favor was, upon full consideration, rejected. We cannot interfere with their discretion in this matter without doing violence to the contract upon which we are called to adjudicate, and must therefore render." In *Manby v. Gresham Life Assurance Company*¹ there was an agreement, if the insured's health should improve, to remit an extra premium charged on account of the infirm state of his health, upon the "society being satisfied" of the fact. Having entirely recovered, and become sound and well, the insured brought his bill in equity to compel them to remit the premium. But the court said they could not interfere with the judgment of the directors, if *bona fide* exercised. It could not undertake to say in which way their judgment should be given.

¹ 29 Beav. 429.

CHAPTER XXII.

OF WAIVER AND ESTOPPEL.

§ 497. BUT insurers may, and often do, find themselves in such a position that they cannot avail themselves either of a breach of warranty, or of a misrepresentation or concealment. And when in this position they are said to be estopped from availing themselves, or to have waived the right to avail themselves, of such a defence. And the rule here is, with reference to the negotiations had at the time of taking out the policy, that where the application is reduced to writing by the insurer or his agent upon the oral statement of the applicant, whether the application is, or is not, made tantamount to a warranty, by being made part of the contract, the insurer being under a strong moral obligation to secure to the applicant the protection for which he pays, if a controversy arises upon the truthfulness of the application, and statements alleged by the insurer to be essential were omitted, and others falsely made, and he seeks to avoid the contract on that ground, parol evidence is admissible to show that, at the time the negotiations were pending, the facts alleged to have been omitted or falsely stated were in fact truly stated, or were accepted, as they were stated, as and for the truth by the insurer, or that the conduct of the insurer led the applicant to believe that such as were omitted were immaterial, and such as were alleged to be false were truly made.

§ 498. *Estoppel by Act of Agent.*—Prior to the case of *Plumb v. Cattaraugus County Mutual Insurance Company*,¹ the rule in that State had been that statements in the application which were referred to and made part of the policy were warranties, a breach of which worked a forfeiture, whether the application was made and signed by the applicant, or, at

¹ 18 N. Y. 392.

his request, filled up by an agent of the company authorized to receive and forward applications, and then signed by the applicant. But in that case the rule was changed upon the following facts: The agent and surveyor of the company presented to the plaintiff a blank application, and solicited him to effect an insurance in the company for which he acted. After some hesitation the plaintiff told the agent that if he insisted upon taking the application that day, he must get along alone, and act on his own responsibility. Whereupon the agent proceeded to make the survey alone; and having filled up the application, presented it to the plaintiff with the assurance that it was all right and just as it should be, who thereupon, stating that he relied upon this assurance, signed it. It appeared, however, that there were material misstatements in the survey as to the relative distances and positions of surrounding buildings. Under these circumstances the court held that it was a case for the application of the doctrine of estoppel, and that, since the agent acted within the scope of his authority, what he had, with a full knowledge of the facts, asserted to be true, the company could not be allowed to prove to be false, for the purpose of showing a breach of the warranty. And the doctrine of this case was subsequently affirmed in the case of *Rowley v. Empire Insurance Company*,¹ where the agent was empowered, among other things, "to take applications." The plaintiff stated verbally to the agent the facts necessary to meet the requirements of the company, and among other things that the property was incumbered by mortgage, and then signed the application, which the agent proceeded to fill up on his return to his residence. In it, however, he stated that there was no incumbrance on the property; and the falsity of this statement the insurers sought to show in order to defeat a recovery. But the court held that they were estopped from so doing. A party who deals with an agent, through whom he applies for and obtains a policy, has a right to presume that such material facts as are made known to him are known to his principal, and when policies are issued with a full knowledge of such facts, the insured is to suffer no preju-

¹ 36 N. Y. (9 Tiff.) 550.

dice, nor are the insurers to gain any advantage by insisting upon conditions which it would be dishonest to enforce.¹ The doctrine of these cases has been made the subject of statutory enactment in Maine, whereby such statements are made conclusive upon the company where the application is drawn up by the agent who knows the facts.²

§ 499. And the Supreme Court of the United States has at last thrown the great weight of its authority into the scale in favor of this doctrine of equitable estoppel,³ the elasticity of which it must be admitted has been put to the test of the severest tension. But to this the courts seem to have been driven by the constantly increasing tendency of insurance companies to seek profit at the expense of the unwary, and protection against sharp, not to say dishonest, practices, by invoking another rule of law, — that parol evidence is inadmissible to contradict or vary the terms of a written contract, — which was intended to prevent fraud and not to work injustice. In that case the court say: —

“In the case before us, a paper is offered in evidence against the plaintiff, containing a representation concerning a matter material to the contract on which the suit is brought, and it is not denied that he signed the instrument, and that the representation is untrue. But the parol testimony makes it clear, beyond a doubt, that this party did not intend to make that representation when he signed the paper, and did not know he was doing so; and, in fact, had refused to make any statement on that subject. If the writing containing this representation had been prepared and signed by the plaintiff in his applica-

¹ *Security Ins. Co. v. Fay*, 22 Mich. (4 Clarke) 473; *Ætna Live Stock and Fire Ins. Co. v. Olmstead*, 21 Mich. (3 Clarke) 246; *North Am. Fire Ins. Co. v. Throop*, ib. 146; *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213.

² Stat. 1861, c. 34, § 2. By that statute it is enacted that “no insurance company shall avoid payment of a loss by reason of incorrect statements of value, or title, or erroneous description by the insured in the contract of insurance, if the jury shall find that the difference between the property as described and as really existing did not contribute to the loss, or materially increase the risk; any change in the property insured, its use or occupation, or breach of any of the terms or conditions of the contract by the insured, shall not affect the contract, unless the risk was thereby materially increased.”

³ *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222.

tion for a policy of insurance on the life of his wife, and if the representation complained of had been inserted by himself, or by some one who was his agent alone in the matter, and forwarded to the principal office of the defendant corporation, and acted upon as true by the officers of the company, it is easy to see that justice would authorize them to hold him to the truth of the statement; and that as they had no part in the mistake which he made, or in the making of the instrument which did not truly represent what he intended, he should not, after the event, be permitted to show his own mistake or carelessness to the prejudice of the corporation.

“ If, however, we suppose the party making the insurance an individual, and to have been present when the application was signed, and soliciting the assured to make the contract of insurance, and that the insurer himself wrote out all these representations, and was told by the plaintiff and his wife that they knew nothing at all of this particular subject of inquiry, and that they refused to make any statement about it; and yet, knowing all this, wrote the representation to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement, would be an act of bad faith and of the grossest injustice and dishonesty. And the reason for this is, that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract; and that it was made by the defendant, who procured the plaintiff's signature thereto.

“ It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels; or, as it is sometimes called, estoppels *in pais*. The principle is, that where one party has, by his representations or his conduct, induced the other party to a transaction to give him an advantage which it would be against equity and conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood, and is applied by courts of law as well as equity where the technical advantage thus obtained is set up

and relied on to defeat the ends of justice or establish a dishonest claim. It has been applied to the precise class of cases of the one before us in numerous well-considered judgments by the courts of this country.”¹

§ 500. **Estoppel — Misrepresentation — Agency.** — In *Sparrow v. Mutual Benefit Life Insurance Company*,² the validity of the policy was made dependent upon the truth of the answers to the inquiries contained in the application; and the insured was inquired of in the same interrogatory as to prior insurance, other insurance, and also if he had insurance upon his life in other companies, in what companies, and to what amount. The answer was, “Yes; 5,000, under policy 17,990.” It appeared in evidence that the insurers, a New Jersey corporation, had a general agent in Boston for Massachusetts, who had supervision over the other agencies within the State, and appointed sub-agents, whose duty it was to submit to applicants for insurance certain questions, and to see that they were answered. This sub-agent solicited the insured, at the place of business of the latter, to make application for insurance, and took down from the dictation of the insured all of the answer except the number of the policy, which was inserted by the clerk of the sub-agent at the latter’s direction, the information having been obtained from the records in the office, and all having been done after the signature of the insured was made to the application. The answer was untrue as to the amount of other insurance, and incomplete as to the offices in which it was placed. It was held to be a question of fact for the jury as to each particular act in the negotiation, whether the agent, who might be acting now for the company and now for the insured, was in fact acting for the one or the other; and the responsibility of each particular act or declara-

¹ *Plumb v. Cattaraugus Ins. Co.*, 18 N. Y. 392; *Rowley v. Empire Ins. Co.*, 35 N. Y. 550; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 526; *Combs v. Hannibal Savings and Ins. Co.*, 43 Mo. 148; *North American Fire Ins. Co. v. Throop*, 22 Mich. 146; *Ætna Live Stock and Tornado Ins. Co. v. Olmstead*, 21 Mich. 246; *Miller v. Mut. Ben. Life Ins. Co.*, 31 Iowa, 216; *McBride v. Republic Fire Ins. Co.*, Sup. Ct. Wis., 2 Ins. L. J. 270; *Miner v. Phoenix Ins. Co.*, 27 Wis. 693.

² Tried before Shepley, J., in the Circuit Court of the United States, First Judicial District (Massachusetts), April, 1873, and not yet reported.

tion would rest with that party for whom the agent acted in the matter, and under whose direction and control, as to that particular matter, he might be, adopting and applying the doctrine as laid down in *Union Mutual Insurance Company v. Wilkinson*.¹ Such an agent is not necessarily the agent of the insurers in every act, because he may be controlled and directed in the particular matter by the insured, when of course he is the agent, *pro hac vice*, for the insured. But where such an agent by his advice, opinion, or otherwise, acting within the general sphere of his duties, leads, directs, or controls the assured, he is the company's agent, and they are bound by his acts and their results. And in the same case where the answer, in the making of which the agent of the company intervened, was untrue and incomplete, the defendant requested the court to instruct the jury that if the insured accepted the policy, with the knowledge that the answers to the several questions were as they appeared at the trial, he was bound by them, whatever knowledge the agent of the company might have had from him, or from any other person, relating to the subject-matter inquired about. But the court declined to so instruct, without qualification, but did instruct that if the insured accepted the policy with the knowledge that the answers were in the words as they appeared at the trial, that those words could not be altered or changed, or their meaning altered or changed by the introduction of parol evidence, and that although the agent of the company was aware from other sources that the answers were untrue, yet if they were knowingly made by the insured and adopted by him, and their truth made the test of the validity of the policy, he was bound by them. But there was a clear distinction between words used in the request as to matters which would conclude the insured, and as to matters which would estop the office. If the insured adopts the particular answer, he is concluded from saying that the words used mean any thing different from what they purport to. But the question as to what concludes the insured is not to be confused with the question as to what estops the office. These are entirely distinct and

¹ 13 Wall. (U. S.) 222; *ante*, § 144.

separate. The office, for instance, presents a question having two clauses. Both are answered with equal truth and fullness. With regard to one clause, the answer is put down and adopted and signed by the assured. With regard to the other, the office puts down but a part of the answer. While the insured is concluded as to the first, yet when the company defends upon the ground that the answer to the second is not true and full, the insured may be allowed to reply that he did say something in reply to the interrogatory which the insurers did not put down, because they regarded it then as immaterial. And although in the light of subsequent events it proves to have been material, yet as the insured determined to omit it, it was their act and not his, and so they shall not be allowed to set it up against him. The questions, whether a party insured is concluded by an answer which he has adopted, and whether the insurers are estopped from setting up some imperfection in an answer, for which they are directly responsible, are entirely distinct. And this distinction is the foundation of the doctrine laid down in the *Union Mutual Life Insurance Company v. Wilkinson*,¹ under which parol evidence is allowed, not to vary or change the language as it is, but to show that the party claiming to set up an omission or modification is in such a condition that he cannot set it up by reason of his own knowledge of his own acts.

§ 501. **Estoppel where Facts arise pending Negotiations.**—This estoppel is oftenest based on matter arising pending the negotiation, as where the amount of the risk taken is beyond the limit prescribed by the charter;² or a special risk prohibited by the by-laws is taken;³ or prepayment of premium, though by the terms of the policy made essential to its validity, is not insisted on;⁴ or an incomplete answer, or no answer at all, to a question

¹ 13 Wall. (U. S.) 222.

² *Hoxsie v. Prov. Mut. Fire Ins. Co.*, 6 R. I. 517; *Fuller v. Boston Fire Ins. Co.*, 4 Met. (Mass.), 206; *Cumberland Valley Mut. Prot. Ins. Co. v. Schell*, 29 Penn. St. 31. But see *post*, § 510.

³ *Merch. and Manuf. Ins. Co. v. Curran*, 45 Mo. 142.

⁴ *Sheldon v. Atlantic Fire and Mar. Ins. Co.*, 26 N. Y. 117; *Heaton v. Manhattan Fire Ins. Co.*, 7 R. I. 502; *Kibbe et als. v. Travellers' Ins. Co.*, N. Y. Supreme Ct., 1872, not yet reported.

in the application;¹ or the insurers renew a policy after notice that the statements in the application are untrue.² Notice which is sufficient to excite attention, and put a party on his guard, and call for inquiry, is notice of every thing to which such inquiry might have led, as of a change of business or an application for a renewal of a policy, where the agent of the applicant states his belief of the fact of a change, and refers to a certain person for information,³ or misleads the insured in the very matter of supplying the information upon which the application is filled up.⁴

§ 502. *Estoppel where Facts arise during the Currency of the Policy.* — It nevertheless not unfrequently takes place where the facts upon which it is based arise after the negotiations have been completed, and during the currency of the contract, as where assessments are made on the premium notes or premiums received after knowledge; actual or constructive, of a breach of the condition of a policy.⁵ "The defendants," said the court, in *Frost v. Saratoga County Mutual Insurance Company*,⁶ "with full knowledge of the facts invalidating the policy, have chosen to act upon the premium note of the plaintiff, as an available security in their favor, and which he was bound to pay. Several sums have accordingly been assessed by the directors of the company, and payment thereof required on said note. These payments have been made by the plaintiff, and

¹ *Hall v. Peoples' Mut. Ins. Co.*, 6 Gray (Mass.), 185; *Blake v. Exchange Mut. Ins. Co.*, 12 Gray (Mass.), 265; *Liberty Hall Ass. v. Housatonic Mut. Fire Ins. Co.*, 7 Gray (Mass.), 261; *Nichols v. Fayette Mut. Fire Ins. Co.*, 1 Allen (Mass.), 63.

² *Witherell v. Marine Ins. Co.*, 49 Me. 200.

³ *Reynolds v. Commercial Fire Ins. Co.*, 47 N. Y. (Com. of App.) 559.

⁴ *Sweeney v. Promoter Life Ass. Co.*, 14 Irish Law, n. s. 476.

⁵ *Ins. Co. v. Stockbower*, 26 Penn. St. 199; *Buckley v. Garrett*, 47 Penn. St. 204; *Keenan v. Dubuque Mut. Fire Ins. Co.*, 13 Iowa, 375; *North Berwick Co. v. New England Fire and Mar. Ins. Co.*, 52 Me. 336; *Tuttle v. Robinson*, 33 N. H. 104; *Frost v. Saratoga Mut. Ins. Co.*, 5 Denio, 155; *Carroll v. Charter Oak Ins. Co.*, 38 Barb. (N. Y.) 402; s. c. in Ct. of App., 10 Abbott, n. s. 166; *Cumberland Valley Mut. Prot. Ins. Co. v. Mitchell*, 48 Penn. St. 334; *Hodsdon v. Guardian Life Ins. Co.*, 97 Mass. 144; *Bevin v. Conn. Mut. Life Ins. Co.*, 23 Conn. 244; *Supple v. Cain*, 9 Irish Law, n. s. 1265; *Wing v. Harvey*, 2 De G., M. & G. 265; s. c. 27 Eng. L. & Eq. 140; *Hale v. Union Mut. Fire Ins. Co.*, 32 N. H. 205.

⁶ 5 Denio (N. Y.), 154.

the question is presented, Can the defendants, who have thus affirmed the original and continuing validity of the premium note, in which the plaintiff has fully acquiesced, be allowed to set up that this policy, which formed the only consideration of the note, was never valid, and that on the sole ground of a breach of warranty on the part of the plaintiff, the facts constituting such breach of warranty being as well known to the defendants when they exacted and received payments on the note as they are at the present time? This is the point to be determined, and I should certainly with great reluctance come to the conclusion that the defendants can be allowed to occupy the position they now assume. It is wholly inconsistent with the ground taken by them when they called for payments on the premium note, and I think common justice forbids any change of position in this respect. 'It is a question of ethics,' as was said in *Dezell v. Odell*,¹ and morality requires that these defendants shall be held strictly to the ground they have chosen to assume for themselves. An estoppel, according to Lord Coke, is where 'a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth.'² Estoppels are of three kinds: by matter of record, by deed, and *in pais*; but our present concern is with the latter class only. Such an estoppel arises when one person is induced by the assertion of another to do that which would be prejudicial to his own interest, if the person by whom he had been induced to act in this manner was allowed to contradict and disprove what he had before affirmed. In the case of *Pickard v. Sears*,³ the principle is thus stated by Lord Denman: 'The rule of law is clear, that when one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.' In the case of *Dezell v. Odell*,⁴ Cowen, J., said: 'We then have a clear case of an admission by the defendant intended to influence the conduct of the man with whom he was dealing, and

¹ 3 Hill, 225.

² Co. Litt. 352 a.

³ 6 A. & E. 469.

⁴ *Supra*.

actually leading him into a line of conduct which must be prejudicial to his interest, unless the defendant be cut off from the power of retraction. This I understand to be the very definition of an estoppel *in pais*.¹ The estoppel is allowed to prevent fraud and injustice, and exists whenever a party cannot in good conscience gainsay his own acts or assertions. The authorities upon this point are numerous, and all speak the same language.¹ 'It makes no difference, in the operation of this rule, whether the thing admitted was *true* or *false*, it being the fact that it has been acted upon that renders it conclusive.'² Here the defendants, in affirming the validity of the premium note, necessarily affirmed that the policy was also originally valid. This affirmation was acted upon by the plaintiff, for he advanced money in consequence of its being made, and the defendants shall not now be allowed to set up any fact *dehors* the policy in order to impeach the original validity of the contract of insurance. *Qui sentit commodum, sentire debet et onus.*"

§ 503. Estoppel if what is undertaken by the Insured is known by the Insurer to be impossible. — So if a policy be issued, or a contract of insurance made, under such circumstances that it is known to the insurers that the conditions of the policy, as to the payment of the premium, will not, because they cannot, be complied with, this will be deemed a waiver of such conditions, and an estoppel against setting up a non-compliance therewith as a defence, as appears by a very recent case in the Circuit Court of the United States for the District of California.³ The San Francisco agent of a New York company forwarded an application, dated June 5, 1867, reciting that if the application was accepted the policy was to be in force from that date. The application was accepted, and a policy, dated April 5, 1867, was issued, reciting that the quarterly premiums were due on or before the sixth days of April, July, October, and January, and providing that if not paid on or before said

¹ Gregg v. Wells, 10 A. & E. 90; Coles v. Bank of England, ib. 437; Sandys v. Hodgson, ib. 472; Stevens v. Baird, 9 Cowen (N. Y.), 274; Welland Canal v. Hathaway, 8 Wend. (N. Y.) 480; 2 Smith, Lead. Cases, 458, 467, notes; 1 Greenl. Ev. §§ 22, 27, 204, 207.

² Ib. §§ 208, 209.

³ Young v. Mut. Life Ins. Co. of New York, 2 Ins. L. J. 289.

days, "at the office in New York (unless otherwise expressly agreed in writing), or to agents, when they produce receipts signed by the president or secretary," it was to be void. The time of passage between San Francisco and New York was then from twenty-three to thirty days, and the policy arrived at San Francisco August 2, 1867. And hereupon the court observes : —

"The policy bears date April 5th, and the receipts prepared by the company correspond with this date. The company, therefore, regarded the second quarter's premium as due July 6th, and acted upon that idea, although the application was made, and the first memorandum receipt and contract given on June 5th. The promissory note given for the first quarter's premium being payable without grace, fell due August 4th. It will be seen that the condition of the policy imposing a forfeiture required payment to be made 'at the office of the company *in the city of New York*, or to agents, *when they produce receipts signed by the president or secretary*, unless otherwise expressly agreed in writing.' There is no evidence in this case of its having been otherwise agreed in writing. It does not appear that the policy was received at the San Francisco office before the 2d of August. At or about the 6th of July the policy must have been in the defendant's office in New York, which would have given twenty-seven days to August 2d, to make the passage to San Francisco. The defendant knew at the time of despatching the policy that the second instalment of premium had *not* been paid *at the office in New York*. It also knew that it *could not be paid to its agents here*, in accordance with the terms of the contract, so as to be obligatory upon defendant, for the reason that the *only receipt duly signed as specified in the policy* authorizing payment to its agents was attached to the policy, and would not reach San Francisco till the month of August, a month after it was due. The defendant did not expect payment at its office in New York city, or it would not have sent its receipt to its agent to enable him to receive payment. The defendant, then, by its officers in New York, transmitted the policy and receipts, with knowledge that payments had not, and would not be

made at the office in New York, and that it *could not be made elsewhere* in the mode required by the terms of the contract for a month after due. Yet the policy was sent with an intent that it should be delivered and payment received by its agent in San Francisco, although it knew that there must necessarily be a forfeiture upon the strict letter of the contract. Also, after the receipt of the policy at San Francisco, on the 2d of August, nearly a month after the instalment fell due, according to the terms of the policy, the defendant's agent, necessarily knowing that payment had not been made, stamped and countersigned the receipt, ready for delivery upon payment, thereby treating the agreement as still in force. Again, on the 8th of August, four days after the note given for the first quarter's premium fell due, and after default in payment, and necessarily with the knowledge of non-payment of both the note and second instalment, the agent of the defendant addressed to Young the note before set out in this opinion.¹

"This act, after the forfeiture, if any there was, had attached, recognizes the agreement as being still in force. The letter does not even demand payment, or refer to the fact of non-payment, or fix any time when the insured should call for the policy or make payment. It simply notifies him that his policy has arrived, and asks whether it should be sent to him at Vallejo, or whether he would call and get it when in the city, implying that it would be at his option to have it sent to him at once, or wait his convenience till he should come to the city and be able to call for it. The defendant manifested no haste or anxiety upon the subject, for the policy was on hand from the second to the eighth of August at least, before the notice to Young was even written, and it does not appear when it was sent. It does not appear that this or any

¹ "SAN FRANCISCO, Aug. 8, 1867.

"M. P. YOUNG, Esq., Vallejo, Cal.

"Dear Sir,— Your policy of insurance with the Mutual Life Insurance Company has arrived. Please inform me whether I shall send it to you at Vallejo, or if you will call and get it when you are in the city.

"Respectfully yours,

"H. D. HOMANS, *General Agent*.

"Per R. W. HEATH, Jr."

other notice reached him. No other act of the company is shown inconsistent with this action, or tending in the slightest degree to show an intention to insist upon a forfeiture till after the death of Young, when the policy was cancelled, October 31st, payment of the loss having before been refused. It could hardly have been expected that Young would call to make the second payment until notified whether the risk had been accepted, especially as there was ample time between June 5th, when the application was made, and the 5th of September, the time when the next payment would have fallen due, had the date of the policy agreed with the date of the application, and the preliminary memorandum of agreement given to him by defendant's agent in San Francisco. It was doubtless supposed that notice of acceptance or rejection would be given before the note for the first quarter's premium would fall due. But however this may be, the several acts of the defendant, and all its acts and the acts of its officers in relation to the matter shown to the court, which were performed subsequent to the accruing of the forfeiture, if any accrued, treat the agreement for insurance as still in force. They affirmatively indicate an intention not to insist upon a forfeiture, and had the accident and death not occurred, there can be no doubt, from the facts shown, that even as late as the death of Young the premium would have been received and the policy delivered. In the case cited by counsel of Chipman against the same defendant, tried in this court a year ago, there was no act of any kind shown on the part of the company indicating an intention to waive the forfeiture, or in any way recognizing a subsisting contract. Whereas in this case, all the acts of the company after the forfeiture accrued, and prior to Young's death, shown to the court, recognize the contract as still subsisting, and manifest an intention not to claim a forfeiture.

"I think, upon the facts, the court must find a waiver of any forfeitures which had accrued, and that, under the circumstances, after the death of the assured, it was too late, for the first time, to insist upon the forfeiture."

§ 504. *Estoppel where Facts arise after Loss.* — So also an

estoppel arises where the facts arise after a loss, as where an offer of settlement after personal examination by an agent is made, and no compliance has been had with the condition that notice of a loss shall be given forthwith, or a particular statement of loss furnished;¹ or notice of an election to rebuild after full knowledge that misrepresentations were made at the time of taking out the policy;² or defective notices, accounts, certificates, or proofs of loss are received without objection, or objections founded on other grounds.³

§ 505. **What Acts or Omissions amount to an Estoppel or Waiver after Loss.**—The terms “estoppel” and “waiver,” though not technically identical, are so nearly allied, and, as applied in the law of insurance, so like in the consequences which follow their successful application, that they are used indiscriminately by the courts. To constitute a waiver, as of a particular account of loss, or an estoppel against setting up the want of such an account as a defence to an action by the insured to recover a loss, there should be shown some act or declaration by the company during the currency of the time within which the account is required dispensing with it, or some delay or omission to act, from which the insured might reasonably infer that the underwriters did not mean to insist upon it. There is a time when objections in matters of form must be taken. If they are not then made, they never can be made. The law does not say that the procedure is perfect, but that the question is not open. The adherence to, and liberal application of, this principle, are necessary to the maintenance of good

¹ *Lycoming County Mut. Ins. Co. v. Schreffler*, 42 Penn. St. 188; *Franklin Fire Ins. Co. v. Updegraff*, 43 Penn. St. 350.

² *Bersche v. Globe Mut. Ins. Co.*, 31 Mo. 546.

³ *Bumstead v. Dividend Mut. Ins. Co.*, 2 Ker. (N. Y.) 81; *Francis v. Somerville Mut. Ins. Co.*, 1 Dutch. (N. J.) 78; *Underhill v. Agawam Mut. Ins. Co.*, 6 Cush. (Mass.) 440; *Kernochan v. New York Bowery Fire Ins. Co.*, 17 N. Y. 428; *Priest v. Citizens' Mut. Fire Ins. Co.*, 3 Allen (Mass.), 602; *Lewis v. Monmouth Mut. Fire Ins. Co.*, 52 Me. 492; *Baxter v. Chelsea Mut. Ins. Co.*, 1 Allen (Mass.), 294; *Bartlett v. Union Mar. and Fire Ins. Co.*, 46 Me. 500; *Noyes v. Washington County Mut. Ins. Co.*, 30 Vt. 659; *Cornell v. Milwaukie Mut. Fire Ins. Co.*, 18 Wis. 387; *Byrne v. Rising Sun Ins. Co.*, 20 Ind. 103; *Mellen v. Eagle Life and Health Ins. Co.*, 2 E. D. Smith (N. Y. Superior Ct.), 268; *Works v. Farmers' Mut. Fire Ins. Co.*, 57 Me. 28; *Turley v. N. A. Fire Ins. Co.*, 25 Wend. (N. Y.) 347; *Rathbone v. City Fire Ins. Co.*, 31 Conn. 193.

faith and fair dealing in judicial proceedings.¹ Thus the insured is estopped to object to a failure to bring suit within the time limited, when such failure is induced by the conduct of the insurers;² or to bringing suit within the time before the expiration of which the loss is not payable, when the insurers deny all liability;³ though it is otherwise if the refusal to pay is conditional, as upon the ground that other suits have been brought against them, and that they will do nothing while these suits are pending.⁴ So parties are estopped from objecting to defective notices, accounts of loss, certificates, and preliminary proofs by an absolute denial of liability; or refusal to pay on the merits of the case;⁵ and by a part payment of the loss.⁶ And if the agent of the company, after an examination of the circumstances attending the loss, informs the insured that he cannot recommend the company to pay the loss because it appears by his statements that he had sold more goods than he had purchased, this is a denial of all liability on the part of the company, and a waiver of its right to demand the usual proofs of loss.⁷ And when one defect alone is objected to, others are waived.⁸ But if the proofs are declared to be defective, the insurers need not go further and specify wherein they are defective, although requested so to do. A reference to the policy for information upon that point will be sufficient to avoid an estoppel or waiver.⁹ And waiver of notice is not a waiver of a particular account of loss where both are required.¹⁰ The insurers will also be estopped to take at the trial any

¹ *Blake v. Exchange Mut. Ins. Co.*, 12 Gray (Mass.), 265, per Thomas, J.

² *Ames v. New York Ins. Co.*, 14 N. Y. 254; *Grant v. Lexington Ins. Co.*, 5 Ind. 23.

³ *Norwich and N. Y. Transp. Co. v. Western Mass. Fire Ins. Co.*, 6 Blatchf. (U. S. C. Ct.) 241.

⁴ *Ripley v. Aetna Fire Ins. Co.*, 30 N. Y. 136.

⁵ *Norwich and N. Y. Transp. Co. v. Western Mass. Fire Ins. Co.*, 6 Blatchf. (U. S. C. Ct.) 241; *Manhattan Fire Ins. Co. v. Stein*, 5 Bush (Ky.), 562; *Francis v. Ocean Ins. Co.*, 6 Cow. (N. Y.) 404.

⁶ *Westlake v. St. Lawrence County Mut. Fire Ins. Co.*, 14 Barb. (N. Y.) 206.

⁷ *McBride v. Republic Fire Ins. Co.*, Sup. Ct. Wis., 2 Ins. L. J. 271.

⁸ *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 176.

⁹ *Kimball v. Hamilton Fire Ins. Co.*, 8 Bosw. (N. Y. Superior Ct.) 495; *Spring Garden Mut. Fire Ins. Co. v. Evans*, 9 Md. 1.

¹⁰ *Desilver v. State Mut. Fire Ins. Co.*, 38 Penn. St. 130.

technical advantage of a mistake into which they have led the insured. Thus where the original policy, which was under seal, was burned with the property insured, and the insured applied for and obtained a copy of the policy, by which it did not appear that the original was under seal, upon which an action of assumpsit was brought, upon objection by the insurers that the original policy was under seal, and that therefore the action should have been covenant, the court refused to allow them to deny that the copy which they themselves had furnished was a true copy.¹ So receiving a premium with knowledge estops the insurers from denying that the property covers the policy;² and if it be a second premium, they will be estopped to set up the collusion and fraud of their agent with the insured, if known to them before the receipt of the second premium.³

§ 506. **No Estoppel where the Facts are not known.** — We have already seen that this estoppel takes place as well upon the acts and omissions of agents as upon those of the principals.⁴ And it need not be said that if there is no knowledge, or the state of facts be not such that knowledge ought to be inferred of the breach of condition or neglect of duty, there can be no waiver of matter of estoppel, as no one can be presumed to have waived that the existence of which he has not known.⁵

§ 507. **No Estoppel where Insured has not been prejudiced.** — An estoppel arises where the insurer, having knowledge of the facts to which he has a right to take exceptions, or which would constitute a defence against any claim under the policy, if he chose to avail himself of them, so bears himself thereafter in relation to the contract as fairly to lead the assured to believe that the insurer still recognizes the policy to be in force, and to constitute for him a valid protection. Under such circum-

¹ *Rockford Ins. Co. v. Nelson*, Sup. Ct. Ill., 2 Ins. L. J. 341.

² *Black v. Columbian Ins. Co.*, 42 N. Y. 393.

³ *Armstrong v. Turquand*, 9 Irish Law, n. s. 32.

⁴ *Ante*, § 498 *et seq.*

⁵ *Finley v. Lycoming County Mut. Ins. Co.*, 30 Penn. St. 311; *Forbes v. Agawam Mut. Fire Ins. Co.*, 9 Cush. (Mass.) 470; *Allen v. Vermont Mut. Fire Ins. Co.*, 12 Vt. 366.

stances the courts refuse to allow the insurer to take an unfair advantage of the acts, declarations, or omissions of the insured to his prejudice.¹ It is not the intention of the insurer, but the effect upon the insured, which gives vitality to the estoppel, and therefore if the circumstances are such that the insured could by no possibility be prejudiced, it is doubtful whether the insurer can be fairly brought within the scope of an estoppel. The insured must be misled to his prejudice. The waiver that is spoken of in these cases is another term for estoppel. It does not arise by implication alone, except from some conduct by one party which leads, or justly may lead, in reliance upon it, another party to believe a certain course of action or non-action on his part will fulfil all his obligations to the first party, so that to allow the first party to disappoint the expectation or belief founded upon and induced by his conduct would be a fraud. To constitute an estoppel there must be such conduct on the part of the insurers as would, if they were not estopped, operate as a fraud on the party who has taken, or neglected to take, some action to his own prejudice in reliance upon it. Where nothing has been done or neglected by their authority, and where no act has been done or left undone by the insured, in reliance upon the act or non-action of the insured, there can be no estoppel.²

§ 508. *Silence and Intent.* — Mere silence, it has been sometimes said, is never a waiver;³ but it is conceived that the true doctrine on this point is, that while mere silence in some cases, where that silence has no effect upon the insurer, may not operate as a waiver, yet in others, where it has the effect to mislead the insurer, it will so operate. And so it is also sometimes said that a waiver never occurs unless intended, or where the act relied on as a waiver is such that it ought in equity to estop the party from denying it. Thus an assessment, by mistake of the treasurer of a mutual insurance company, on a premium note, upon a vote to assess "all policies in force" after the policy has been declared forfeited for breach

¹ *Viele v. Germania Fire Ins. Co.*, 26 Iowa, 9.

² *Security Ins. Co. v. Fay*, 22 Mich. 467.

³ *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 176.

of condition, though the assessment be paid, is no waiver. The assessment, not being by the authority of the company, is not their act, and of course they can intend nothing by it. They have no knowledge of the act, and to constitute waiver there must be not only knowledge of the thing waived, but the act of waiver must be knowingly done.¹ But this also, it will be observed, limits the knowledge or intention to the act that constitutes the waiver, and with this limitation is no doubt the law. The waiver may be actually unintentional, though if the act out of which it comes be intentional, the waiver is constructively so.

§ 509. *Agent acting under undisclosed Instructions.* — The energetic language of the court in a very recent case in Illinois,² not only leaves no doubt as to the position of that court, but well expresses the spirit of the modern decisions touching the responsibility of insurance companies for the acts of their agents in violation of instructions. "We desire it to be understood," is the language of the court, "in this jurisdiction, at least, when an insurance company has appointed an agent, known and recognized as such, and he, by his acts, known and acquiesced in by them, induces the public to believe that he is vested with authority to do the act, and nothing to the contrary is shown or pretended at the time of doing the act, public policy and the safety of the people demand that the company should be liable for such acts as appear on their face to be usual and proper in and about the business in which the agent is engaged. It is the fault of the companies in sending out agents among the people, gaining public confidence by the seeming acquiescence of their constituents in the conduct of their business. When a loss happens, they should not be permitted to say in any case that their agent acted beyond the scope of his authority, unless it shall be made to appear that the insured was informed of and knew the precise extent of the authority conferred. Any other principle in its operation would be turning loose upon an unsuspecting, honest, and

¹ *Diehl v. Adams County Mut. Ins. Co.*, 58 Penn. St. 443; *Beatty v. Lycoming County Mut. Ins. Co.*, 66 Penn. St. 9.

² *Etna Ins. Co. v. Maguire*, 51 Ill. 342.

confiding people a horde of plunderers, against which no ordinary vigilance could guard," — language which, if it savors somewhat more of the fervor of the advocate than is accustomed to be heard from the bench, it must be confessed, ought to find its full justification in the indignation which must at times be felt at the pertinacity with which insurers seek to shelter themselves behind instructions, the existence of which is not only not known to others, but in point of fact is practically denied by the daily conduct both of themselves and their agents.

§ 510. *Estoppel where the Act is prohibited by the Charter.* — We have already seen that by the general current of the authorities insurance companies may waive a compliance with the provisions of their charters and by-laws,¹ though in Massachusetts and in some other States this doctrine is not admitted as applicable in mutual insurance to the essentials of the contract, but only as to such matters as pertain to its enforcement after a loss.² And a quite recent case in Connecticut, upon full consideration, adopts and approves the doctrine of the Massachusetts cases, in an opinion, which, as it presents some novel views, we give at length : —

"The twelfth section of the charter of the defendants provides that, 'If there shall be any other insurance upon the whole or any part of the property insured, by any policy issued by said company, during the whole or any part of the time specified in such policy, then every such policy shall be void, unless such double insurance shall exist by consent of said company, indorsed upon the policy, under the hand of the secretary.' There was such double insurance in this case, at the time this policy was issued, and the consent of the company thereto was not indorsed upon the policy. The charter, therefore, declares the policy void, and it is void, unless the twelfth section is of such a character that its provisions can be waived by the defendants.

"If this provision was made solely for the benefit of the defendants, there might be force in the claim of the plaintiffs that it could be waived, on the ground that what is exclusively

¹ *Ante*, §§ 62, 143, 501.

² *Ante*, § 147.

for the benefit of a person, either natural or artificial, is for him to enjoy or not, as he pleases, and if he chooses to forego the benefit, he has a right to do so, as no one but him is interested in the matter. But we think that the defendants are not solely interested in this provision of the charter. It was made to guard against the danger of over insurance. It is well known that over insurance encourages incendiary fires; and insurers are therefore extremely careful not to insure property to the full amount of its value, but leave the assured to be himself the insurer of a part thereof, that he may have a common interest with them in the preservation of the property.

“The eleventh section of the defendants’ charter, as well as the one under consideration, shows what solicitude the legislature entertained upon this subject, and the great care they exercised to prevent this evil.

“Such being the tendency of over insurance, it is manifest that it endangers not only the welfare of insurers, but the welfare of all their policy holders, who have a deep interest in their solvency in case of loss by fire. Insurance companies insure property to an amount many times their capital, and it may easily happen that a few fraudulent incendiary fires, scattered over the country, should involve them and their policy holders in heavy and perhaps ruinous losses. But the evil of over insurance does not stop here. Everywhere insured property is mingled indiscriminately with property not insured. The burning of the insured property burns the other also, and every year vast amounts of property not insured go to destruction in consequence of the over insurance of property in its neighborhood. Surely the welfare of such owners should be considered by legislatures, and provision should be made for them when corporations like these are created. It is to be considered, also, that the welfare of the State, which has an interest in all the property of the State, requires that this should be done.

“One great source of this evil is the insurance of the same property by different companies, when each company is not aware of the act of the other. To prevent this evil as far as may be, in the present case we think the legislature inserted

the twelfth section in the defendants' charter, intending thereby to put it out of the power of the defendants to insure property otherwise than is provided therein.

"The evil could not be successfully reached by merely requiring the *consent* of the company to such further insurance. There would be no security from misunderstanding, misremembrance, and fraud. The difference is great between leaving the consent of the company to be proved by the vagueness and uncertainty of parol evidence, and requiring it to be shown by a formal indorsement upon the policy by the hand of their secretary, which could not be made without consideration and deliberation on the one hand, and certainty of the fact on the other.¹ This difference is all-important in a case like this, and indeed if mere consent was all that the legislature intended by the twelfth section of this charter, then no object was accomplished, or could be accomplished, by inserting it in the charter; for if the defendants should make an absolute contract of insurance, without any condition that it should become void if there was or should be further insurance on the property by any other company, during the whole or any part of the time covered by the policy, they would be taken by jurors as having given consent in advance to such further insurance; or the mere fact of such absolute contract would be sufficient evidence with them of a waiver of the condition. It would be urged that the plaintiff was ignorant of the provisions of the charter, and if the defendants intended to make it a part of the contract, they would have informed the plaintiff by inserting it in the policy.

"Thus, in order to make it a part of the contract, it would have to be inserted in the policy of insurance, whether it was embodied in the charter or not; and if inserted in the policy it would have all the effect that the charter could give it, if the legislature intended no more by this provision than mere consent. We think, therefore, that the legislature had more than this in view, and intended to limit the power of the company in the matter, and that it was not competent for the plaintiffs to prove the consent of the defendants to the double insurance on the plaintiffs' property by any other evidence than an indorsement

¹ Hale v. Mechanics' Mut. Fire Ins. Co., 6 Gray, 169.

of such consent on the policy, under the hand of the secretary of the company, and that the jury should have been so instructed.”¹

§ 511. **Waiver — Express Stipulation against.** — A clause in a policy of insurance that “nothing but a distinct specific agreement, clearly expressed and indorsed on the policy, shall operate as a waiver of any printed or written condition, warranty, or restriction thereon,” refers to those conditions and provisions of the policy which enter into and form a part of the contract of insurance, and are essential to make it a binding contract between the parties, and which are properly designated as *conditions*, and not to those stipulations which are to be performed after a loss has occurred, such as giving notice and furnishing preliminary proof of the loss.²

§ 512. **Estoppel — Notice from Stranger.** — If the object of requiring notice of increased risk, or of a change of circumstances calculated to produce such increase, be stated to be that the insurer may exercise or not an option reserved to him to cancel the policy, which he reserves the right to do at pleasure, and without assigning any reason therefor, and he obtains notice from other sources of such facts, since this accomplishes the purpose for which the condition is made, and to all intents and purposes places the insurers in as good a position as if the facts had been notified to them by the insured himself, this knowledge, so obtained by the insurers from other sources, will inure to the benefit of the insured, and excuse his default, if any, in failing to give notice. Or, at all events, if the insurer, when these facts come to his knowledge, do not thereupon elect to cancel his policy, but allows it to remain, he will not be permitted afterwards to set up such default in defence.³

§ 513. **Collusion between Agent and Insured.** — Insurers, however, will not be estopped to set up a misrepresentation or concealment or a breach of warranty in defence to an action, if it shall appear that there was a want of good faith on the part of the insured, as where it is known to the insured that the agent

¹ Couch v. City Fire Ins. Co., 38 Conn. 181.

² Franklin Fire Ins. Co. v. Chicago Ice Co., 36 Md. 102.

³ Eclipse Ins. Co. v. Schœner, 2 Cincinnati Superior Court Reporter, 474.

is violating his instructions in taking the insurance, and especially, if there be collusion between them, to falsely describe the property in order to bring it into the category of insurable subjects, upon which the agent is permitted to take risks. If, for instance, it is known to both that the company will not insure hotels, and for the purpose of evading this restriction it is agreed between them to describe the insured property as a boarding-house, under such circumstances the insurers would not be estopped to set up the fraud. If they were, then the insured would derive advantage from his own fraud. And this would be counter to the whole purpose and object of an estoppel, which is to discountenance and circumvent fraud. And it is only when its enforcement will operate to this end, that it can properly be invoked. Besides, the knowledge of the agent is imputable to the principal, on the presumption that the agent, in the honest discharge of his duty, communicates to his principal all the material facts, touching the negotiation, which come to his knowledge, — a presumption which can hardly have place, when the facts to be communicated would convict him of a dereliction of duty.¹

¹ *Rockford Ins. Co. v. Nelson*, Sup. Ct. of Ill., 2 Ins. L. J. 341.

CHAPTER XXIII.

OF ACCIDENT INSURANCE.

§ 514. **Definition of Accident — Injury causing Death — Strain.** — What is an accident? This question arises at the very threshold in the consideration of this branch of insurance, and has been, and is likely to continue to be, a fruitful source of discussion. No satisfactory definition seems yet to have been given by the courts, though numerous cases have occurred where they have been called upon to decide whether death or injury from particular causes was, or was not, accidental. In a recent case in the Supreme Court of Pennsylvania,¹ it appeared that while the insured was pitching hay the handle of the pitchfork slipped through his hands and struck him on the bowels, inflicting an injury which produced peritoneal inflammation, in consequence of which he died, and this was held to be an accidental death. And the same would have been the case, say the court, if a strain had been the cause of the inflammation which produced death. Death by accident was defined to be “death from any unexpected event which happens as by chance, or which does not take place according to the usual course of things.” So a sprain of the muscles of the back, caused by lifting heavy weights in the course of business, is injury by accident or violence “occasioned by external or material causes operating on the person of the insured.”²

§ 515. **Accident — Rupture from Jumping.** — On the other hand, it has been said by a learned judge, sitting as arbitrator, that “rupture caused by jumping from the cars while in motion, and afterwards running to accomplish certain business purposes, done voluntarily, and in the ordinary way, and without any necessity therefor, and with no unforeseen or

¹ North American Ins. Co. v. Burroughs, 69 Penn. St. 43.

² Martin v. Travellers' Ins. Co., 1 F. & F. 505.

involuntary movement of the body, such as stumbling or slipping or falling, is not by violent and accidental means. It might be otherwise if, in jumping, the insured should lose his balance and fall, or strike against some unforeseen object, or in running should stumble or slip.”¹ The learned arbitrator based his award upon the following, amongst other reasons:—

“The policy is one of indemnity against ‘bodily injuries, effected through violent and accidental means, within the meaning of this contract and the conditions hereto annexed.’ Had the terms of the contract stopped at the words ‘violent and accidental means,’ there would be no difficulty, in my judgment, in disposing of the questions; for there was no accident, strictly speaking, in the means through which the bodily injury was effected. It would not help the matter to call the injury itself, that is, the rupture, an accident. That was the result, and not the means, through which it was effected. The jumping off the cars, or the running, was the means by which the injury was caused. Both were done by the claimant voluntarily, in the ordinary way, with no unforeseen, accidental, or involuntary movement of the body whatever. There was no stumbling or slipping or falling. There was nothing accidental in his movements, any more than there was in his passing down the steps of his hotel, or in his walking on the street, during each of which he might have had a stroke of apoplexy, or a hemorrhage, a rupture of a blood-vessel in the head or the lungs. True, in jumping from the cars and running there was more violence, or, properly speaking, more force; but there was no more accident than in any ordinary movements of the human body. How, then, admitting the rupture to have been effected by jumping from the cars, or by running to see if they were coming, can it be said that it was caused by accidental as well as violent means? All the accident there was, was the result of ordinary means, voluntarily employed, in a not unusual way.

“But the words ‘violent and accidental means’ are fol-

¹ Southard v. The Railway Passengers’ Ass. Co., 34 Conn. 574, per Shipman, Judge of the District Court of the United States, acting as arbitrator.

lowed in the policy by the words 'within the intent and meaning of this contract and the conditions hereunto annexed.' Now we are to consider how far the former words are qualified by the other parts of the contract, or by the conditions thereto annexed. I have cited from the policy all that can have any bearing on the question. The provision which I have cited from the policy excludes from indemnity death or injury when caused by 'duelling, concealed weapons, when carried by the insured, fighting, wrestling, over-exertion, and lifting (except in case of perilous necessity), suicide, sunstroke;' and also 'death or injury happening in consequence of war, riot, invasion, riding or driving races, unnecessary exposure to danger or peril, or violation of the rules of any company or corporation.' It also excludes 'death or injury happening while the insured is, or in consequence of his having been, under the influence of intoxicating drinks, or engaged in any unlawful act.' Now it may be said that this specific exclusion from the scope of indemnity of death or injury happening from causes and under circumstances expressly set forth, leaves, by fair implication, death or injury from all other causes, and under all other circumstances, included in the contract of indemnity; thus logically inverting or complementing the maxim, *expressio unius est exclusio alterius*. But in applying this well-known rule of construction, reference must be had to the main body of the contract and to its subject-matter. It is not, nor does it purport to be, a contract of indemnity against death or injury effected by all means. The cause of the death or injury must in all cases be 'violent and accidental,' or the event is without the scope of the contract. The instrument by its terms embraces only cases where the elements of force and accident concur in effecting the injury. The cases excluded are only those which belong to the same class. The contract declares to the insured that though he may be killed or injured through violent and accidental means, yet if the calamity occurs under certain circumstances, the insurers will not be liable. Violent and accidental death or injury might occur, and often does occur, under the circumstances enumerated in the excluding clause.

“The contract, as I have already intimated, in its broadest scope only embraces within its indemnity personal injuries effected through forcible and accidental means; and the proviso simply excludes from this class of injuries all that occur under the circumstances enumerated. All others of this class are included. The degree of violence or force is not material, and had the insured in this case in jumping from the car lost his balance and fell, or struck upon some unseen object and wounded himself, or in running had stumbled or slipped on the ice, his injury might be attributed to accidental as well as violent means, and assuming that there was no want of due diligence on his part, his misfortune would have been covered by the policy. But, as I have already stated, the injury which he received was in no sense the result of accident. He jumped from the car with his eyes open, for his own convenience, and not from any perilous necessity. He encountered no obstacle in doing so. He alighted erect on the ground just as he intended to do. So in running, he ran from no peril or necessity, but for his own convenience, voluntarily, and, from all that appears, without stumbling, slipping, or falling. In both cases he accomplished just what he intended to, in the way he intended to, and in the free exercise of his choice. No accident of any kind interfered with his movements, or for an instant relaxed his self-control. All that he claims is, that, some hours after, it was discovered a muscle in the walls of the abdomen had given way under the strain to which he had voluntarily put it, under circumstances free from all peril or necessity. Assuming that this rupture was caused either by his jumping or running, or both, does not help the matter, unless we call running and jumping accidents. I therefore am of opinion that the alleged injury did not result from an accident, within the meaning of the contract.”

§ 516. **Accident — Drowning — Secondary Cause.** — In *Trew v. Railway Passengers' Assurance Company*,¹ the question arose whether a man who was drowned while bathing, nothing being known of the particular circumstances under which the drowning happened, came to his death by “accident or vio-

¹ 5 H. & N. (Exch.) 211.

lence," and the conclusion of the court seemed to be that whether such death was accidental or not would depend upon the circumstances. These the plaintiff could not show, and as the burden of proof was upon him he must fail, as there was nothing by which the jury or the court could determine one way or the other. All the evidence there was, was as consistent with the theory that he died of natural causes as from accident. "If a person," said Martin, B., by way of illustration, "mistook the depth of the water, and in plunging into it struck his head against a rock and was killed, that would be a death from injury caused by accident; but death from apoplexy would not." "This case," said Watson, B., "ranges within that class where, if the state of facts is consistent with one view or the other, there is no evidence for the jury. Here there is no evidence how the assured died (except that there was some evidence that he was drowned while bathing); he may have died from apoplexy, or he may have been struck by a boat. If a man was found dead in a railway carriage, we could not assume that he died from an accident; but if he was found with marks of violence upon his person, the case would be different. There is nothing to lead to the supposition that the assured died in the one way rather than the other." But this decision was reversed in the Exchequer Chamber, Cockburn, C. J., delivering the opinion of the court. "We are all of the opinion," said the learned Chief Justice, "that this nonsuit was wrong, and that the judgment of the Court of Exchequer in refusing to set it aside was erroneous. It is said that, assuming the deceased died by drowning, drowning is not one of the cases comprehended in this policy of assurance. Mr. Lush ingeniously argued that the policy only applies to cases where, from accident or violence, some injury occurs, from which death may, or may not, ensue; and if it ensues within three months, the sum assured is payable. But he contended, in effect, that where the cause of death produces immediate death without the intervention of any external injury, the policy does not apply; and, whereas from the action of the water there is no external injury, death by the action of the water is not within the meaning of this policy. That

argument, if carried to its extreme length, would apply to every case where death was immediate. If a man fell from the top of a house, or overboard from a ship, and was killed, or if a man was suffocated by the smoke of a house on fire, such cases would be excluded from the policy, and the effect would be that policies of this kind, in many cases where death resulted from accident, would afford no protection whatever to the assured. We ought not to give to those policies a construction which will defeat the protection of the assured in a large class of cases. We are, therefore, of opinion that, if there was evidence for the jury that the deceased died by drowning, that was a death by accident within the terms of this policy. The next question is whether there was evidence for the jury that the assured met with his death by drowning. It appears that he went to Brighton for recreation, and there is no reason to suppose that he intended to commit suicide. He left his lodgings for the purpose of bathing, and his clothes were found by the water-side, but he himself was not afterwards seen. A body was found in the water at a distance from the place where he went to bathe, but not at such a distance that it might not have been carried there by the waves. There was some evidence that this was the body of the assured, and assuming that it was, the question ought to have been submitted to the jury whether he met with his death by drowning. If they found that he died in the water, they might reasonably presume that he died from drowning. It is true that death occurs in the water in some instances from natural causes, as apoplexy, or cramp in the heart, but such cases are rare, and bear a small proportion to the number of deaths which take place from the action of the water. We think it ought to be submitted to the jury to say whether the deceased died from the action of the water, or natural causes. If they are of opinion that he died from the action of the water, causing asphyxia, that is a death from external violence within the meaning of this policy, whether he swam to a distance and had not strength enough to regain the shore, or on going into the water got out of his depth."

§ 517. Accident — Drowning. — In *Mallory v. Travellers'*

Insurance Company,¹ it appeared that the insured disappeared on Sunday evening, when he was seen walking on a railroad track, and his body, with a cut on the back of the head, was found in a creek which passed under the railroad through a culvert. A motion was made for a nonsuit, on the ground that there was no evidence to go to the jury of death by accident. But this motion the court refused to allow, and left it to the jury to find whether the death was by accident or not, charging them that the injury on the head need not be the cause of the death, but that if it lead to other results, accidental, from which death ensued, the company would be liable. On appeal, it was held that the circumstances attending the finding of the body were sufficient to require the submission to the jury of the question whether the death of the insured was the result of accident or of disease, or some other cause not insured against. The actual cause of death was not certainly proved by the evidence in the case; but when considered in connection with the presumption that sane persons do not ordinarily commit acts, the probable consequence of which will be self-destruction, it was sufficient to justify the inference that the deceased fell off, or was hurled off by a violent blow, from the culvert into the stream below, and was drowned. The policy provided for the payment of a gross sum in case of death from accident, and also for the payment of a fixed rate per week in case of injury not fatal but disabling. It also provided that no claim should be made under the policy, in respect of any injury, unless the same shall be caused by some "outward and visible means." And it was held that this last provision applied only to non-fatal injuries.²

§ 518. **Accident** — "Cause of Death arising within the System" — "Secondary Cause." — In the case of *Fitton v. The Accidental Death Insurance Company*,³ the deceased met with a violent fall, by which he immediately became ruptured in the bowels, and afflicted with strangulated hernia in the abdomen, for

¹ Decided at the General Term of the New York Supreme Court, 2d Dist., on appeal, and not yet reported, but cited in Bliss on Life Insurance, p. 707.

² This case was affirmed in the Ct. of App., 47 N. Y. 52.

³ 17 C. B. N. S. 122; S. C. 34 L. J. 28 (C. P.).

which a surgical operation was necessarily performed, in consequence of which, and the hernia, he died. The question was whether this was a death within the exception of a policy which provided that the company did not insure against death or disability arising from rheumatism, gout, hernia, erysipelas, or any other disease or cause arising within the system of the insured, before, or at the time, or following such accidental injury, whether causing such death or disability directly or jointly with such accidental injury. And it was held that such a death did not arise from a cause within the system, and so was not within the exception. In *Smith v. The Accident Insurance Company*,¹ where the facts were that death followed from erysipelas, caused by and expressly found to be the result of an accidental incised wound, and supervening four days after the wound was received, and the provisions of the policy were identical with those in the case last cited, except that the word cause was qualified by the word "secondary," three of the judges held this to be within the exception, and distinguished it from *Fitton v. The Accidental Death Insurance Company*,² on the ground that there the accident caused the hernia at the very moment the accident happened, and was part and parcel of it, while here the erysipelas supervened only after a lapse of four days, and so was a "secondary" cause within the meaning of the policy.³ In other words, hernia supervening immediately to the accidental violence would not be within the exception of the policy, while erysipelas supervening to the same accidental violence four days afterwards would, — a distinction which seems to rest not on the question whether the disease was caused by the violence, but on the lapse of time intervening between the violence and the appearance of the disease caused thereby, and would therefore seem to be unsatisfactory, if for no other reason, because it is impracticable. The contract might make a limitation as to time, but as it does

¹ 22 L. T. 861.

² *Ubi supra*.

³ In *Harris v. Travellers' Ins. Co.*, Superior Ct. Chicago, 1868, cited in *American Law Review*, July, 1873, p. 589, it was held that death by suicide, three months after an accident, by an insane person, whose insanity was caused by an accident, was not covered by the policy, as the accident was not the proximate cause.

not, it is difficult to see how the courts can say violence producing fatal disease at one time is within the exception, while producing it at another time it is not. What is the limited time which takes the case out of or brings it within the exception? But Kelley, C. B., dissented, and thought that the defendants were liable on the policy; the effect of the condition being to exempt the company from liability only in respect of a death from erysipelas, where the erysipelas "arose within the system," and was, as it were, collateral to, and not caused by, the accident to the insured; and that where an insurance company think fit to introduce an exception to the liability for which they have contracted under the policy of insurance, they are bound to express that exception in clear and unambiguous language, so as to leave no reasonable doubt upon the subject; and if there is any ambiguity, that is enough to take the case out of the exception, and the construction should be against the company. As death under similar circumstances is very likely to happen, presenting a like case for the decision of other courts, the views of the learned Chief Baron, so clearly and ably presented, are here presented in full:—

"This is unquestionably a doubtful and difficult case, and, after listening to the opinions of my learned brethren, I cannot but in some measure mistrust my own judgment; but I am of opinion that the plaintiff is entitled to recover. The facts, as found by the arbitrator, are clear. The deceased, who was insured by the defendants against accidents generally, whilst washing his feet in an earthenware bath sustained an injury, by cutting one of them near the ankle on the ragged edge of the bath. For that wound a surgeon attended him, and he was taken to a hospital. Five days after the accident erysipelas supervened, and in two days more he died of that disease. It is expressly found that the erysipelas, which was the immediate cause of death, resulted from the wound, and that unless he had been wounded he would not have had erysipelas.

"The question is whether this death, thus occasioned, is within the meaning of the defendants' policy. Now, I entirely agree with the observations of Willes, J., in *Fitton's case*, that it is extremely important, with reference to insurances, that

there should be a tendency rather to hold for the assured than for the company, where any ambiguity arises on the face of the policy ; and I will add that it appears to me to be equally important that where an insurance company think fit to introduce an exception to a liability which they have contracted to bear, they should express that exception in clear, unambiguous terms. But when I read this condition, I cannot, especially having regard to the principles of construction laid down, and the decision arrived at in *Fitton's case*, see that the exception as to erysipelas is so worded as to protect the defendants here. The Court of Common Pleas, in the case referred to, put a judicial construction on this very clause, save that the words 'secondary cause' have been introduced since their decision. There, Williams, J., in his judgment, says: 'Looking at the language of the policy, and taking the first condition altogether, upon the best interpretation I can put upon it, I am of opinion that it means to exempt the company from liability only where the hernia arises within the system ;' and I am of opinion, in conformity with the opinion there delivered by Williams, J., that it is the effect of the condition to exempt the company from liability only in respect of death from erysipelas, where the erysipelas arises within the system and is collateral to the accident.

" But let us proceed to look a little more closely at the words of the condition. After stating the accidents or causes of death that are insured against, it goes on to specify those causes which are not, including 'rheumatism, gout, hernia, erysipelas,' and then come the words which have been so fully discussed, 'or other disease or secondary cause or causes arising within the system of the assured before, or at the time, or following such accidental injury.' Now, according to the view taken by the rest of the court, erysipelas is for all purposes expressly excepted from the series of events which create a liability in the defendants. But if this be the true view, why not have stopped at the word 'erysipelas,' and have added 'however caused, whether by an accident or otherwise?' Moreover, it should be remarked that this unqualified and unlimited construction is inconsistent with the decision in *Fitton's case*, where the death of the insured was from hernia caused by the

accident. It is clear to me, therefore, that we must construe these words with reference to those which follow, and place some limitation upon them.

“To revert once more to the language actually used, let us contrast for a moment what the defendants have said with what they might have said. Instead of excepting rheumatism, hernia, &c., whether causing death ‘directly or jointly’ with the injury, they might have excepted them in unambiguous terms, ‘whether produced by the accident or otherwise,’ and in the same manner they might have gone through a whole catalogue of consequences likely to supervene on a cut or a bruise, such, for instance, as mortification or hemorrhage, and, by excepting them expressly, have really rendered the policy almost nugatory. Indeed, they might effect this purpose under the present words, if my learned brethren are right, by merely increasing the diseases specified by name. But could it be contended that by an express mention, say of hemorrhage or mortification, the defendants could exonerate themselves where death had ensued from mortification or hemorrhage supervening on a cut? The death would still be from the cut, and the policy, in my judgment, would be available; for the general effect and true construction of such a document seems to me to be, that it covers not only the actual injury itself, but any disease, like lockjaw, mortification, or erysipelas, which is caused by and may be regarded as the natural and probable consequence of the injury.

“It remains to be considered whether the words of the condition, which have been introduced since the decision in *Fitton’s* case, make any difference in the extent of the defendants’ liability. Without these words, I think that decision is a clear authority for the plaintiff here. But it is by them provided that the policy does not insure against death from the enumerated disorders, or ‘any other disease or secondary cause arising within the system of the insured.’ Now I pause upon the word ‘secondary,’ because it certainly does introduce doubt as to the true construction of the sentence. If it means that whenever the hernia or erysipelas, causing death, is the secondary consequence of the accident, the defendants are not to be lia-

ble, then the present case would be within the exception. But I do not think it can be taken in this unqualified sense. It appears to me to be no more than a general word, descriptive of the character of the previously enumerated maladies, and that it must be read with reference to the words immediately following.

“The whole sentence thus read bears to my mind a plain and intelligible, and, but for the opinion of my learned brethren, I should have said an obvious meaning. It enumerates a certain class of maladies which are of a secondary character, and which may all of them arise within the system, and continue collaterally to and parallel with the injury sustained; and it provides that where death is caused by any of these secondary diseases arising within the system, then the policy shall not attach, even though the disease, unless aggravated by or conjointly with the injury, would not have been fatal. I do not see how it is possible to reject these words, ‘arising within the system,’ from our consideration; and I find no words in the condition capable of being construed to except the secondary disease of erysipelas altogether, in such a case as this, where it did not ‘arise’ at all within the system, — where (as the arbitrator finds) it never would have arisen but for the accident, and where it was the direct consequence of that accident. My conclusion as to this construction of the condition is strengthened by the remaining words of the condition. The company are not to be liable for a secondary cause arising within the system ‘before, or at the time of, or following such accidental injury, whether causing such death directly or jointly with such accidental injury.’ The very use of this word ‘before’ is an additional reason for construing the whole condition as I do. It shows that the real intention was to provide against secondary diseases arising within the system, and which might and probably would, therefore, be before the accident, in point of time, and wholly independent of and collateral to it, and not against those which, like the erysipelas here, were the direct consequence of the accident, and but for that would never have existed at all. And the last material words of the condition, ‘whether causing such death directly

or jointly with such injury,' also seem to me applicable to a class of diseases causing death either directly or jointly with the injury, but being in their nature wholly collateral to it. Taking, then, the condition as a whole, I am of opinion that it points to a particular class of diseases which arise within the system, either before, at, or after the injury, and exempts the defendants from liability when death is caused by any of them, either directly or jointly with the injury, but that it does not apply to any of these diseases when they supervene on the injury, are caused solely by it, and are its natural consequence. In my judgment, this construction is the one which is the more reasonable and natural of the two contended for; but even if I were in doubt, I should still think that the ambiguity of the language used is such as to warrant me in acting on the well-known principle of construction applicable to policies of insurance, and in giving the benefit of that ambiguity to the assured. As, however, my learned brethren are of a contrary opinion, the judgment of the court must be for the defendants."¹

¹ The clause of the policy which comes under discussion in the above case was as follows: "This policy insures against all forms of cuts, stabs, tears, bruises, concussions, crushings, gunshot wounds, poisoned wounds, sprains, ruptured tendons, broken bones, dislocations, burns and scalds; the effects of explosions and chemicals, frost-bites, bites of mad dogs, serpents, or insects; the action of lightning, suffocation by choking, drowning, hanging, when accidentally occurring from material and external cause (operating upon the person of the assured), where such accidental injury is the direct and sole cause of death to the insured, or disability to follow his avocations: but it does not insure against death or disability arising from rheumatism, gout, hernia, erysipelas, or any other disease or (secondary) cause (or causes) *arising within the system of the insured*, before, or at the time, or following such accidental injury, whether causing such death or disability directly or jointly with such accidental injury; nor against death or disability arising from fighting, duelling, the hands of justice, from intentional self-injury, whether under the influence of insanity or not; nor from injuries sustained on a railway whilst travelling, otherwise than in a passenger carriage (nor whilst getting into or alighting from any carriage in motion), or whilst acting in violation of the by-laws of a railway company; nor from injuries received in the exposure of himself to obvious and unnecessary risk or injury; nor from injuries received whilst the insured shall, by intoxicating liquors, be rendered less capable than usual of taking care of himself, or whilst performing any unlawful act; nor against death or disability arising accidentally from any thing administered, or from any act performed for the treatment of disease, whether surgical, medical, or otherwise, except from surgical operations performed for the treatment of injuries enumerated in the first part of this clause, for which compensation

In a still later case, in England, where the insured went in to bathe, and while in a shallow pool was seized with a fit whereby he became insensible, and fell with his face downwards, so that his face was partially submerged, and he was suffocated by the access of water to his lungs, this was held to be a death by accident, and occasioned by an "external and material cause operating upon the person of the insured." Death here was the result of the action of the water on the lungs, and the consequent interference with respiration, and the fact of falling into the water from sudden insensibility was an accident.¹

§ 519. **Accident — Sunstroke.** — In a case involving the question whether death by sunstroke was a death by "accident" within the meaning of the policy, it was said that in the term "accident" some violence, casualty, or *vis major* is necessarily involved, and that disease produced by a known natural cause, as in the case of sunstroke, cannot be considered as accidental, any more than disease or death engendered by exposure to heat, cold, damp, the vicissitudes of climate, or atmospheric influences; unless, perhaps, in cases where the exposure is actually brought about by circumstances which may give it the character of accident. Thus, by way of illustration, if, from the effects of ordinary exposure to the elements, such as is common in the course of navigation, a mariner should catch cold and die, such death would not be accidental; although if being obliged by shipwreck or other disaster to quit the ship and take to the sea in an open boat, he remained exposed to wet and cold for some time, and death ensued therefrom, the death might properly be held to be the result of accident. It is true that in one sense disease or death through the direct effect of a known natural cause, such as we have referred to, may be said to be accidental, inasmuch as it is uncertain beforehand whether the effect will ensue in any particular case. Exposed to the same malaria or infec-

under this policy would be otherwise payable; nor against injury occurring by any (attack or assault made upon him by any other party or parties, or any) invasion, foreign enemy, civil commotion, popular riot, or any military or usurped power whatever; and in no case against death or disability occurring beyond the period of three months from the date of the injury."

¹ Reynolds v. The Accidental Ins. Co., 22 L. T. N. S. 820.

tion, one man escapes, another succumbs. Yet diseases thus arising have always been considered not as accidental, but as proceeding from natural causes.

"In the present instance the disease, called sunstroke, although the name would at first seem to imply something of external violence, is an inflammatory disease of the brain, brought on by exposure to the too intense heat of the sun's rays. It is a disease to which persons exposing themselves to the sun in a tropical climate are more or less liable, just as persons exposed to the other natural causes above referred to are liable to disastrous consequences therefrom."¹

§ 520. **Accident—Death by Robbers.**—In *Ripley, Administrator, v. The Railway Passengers' Insurance Company*, where it appeared that a man was waylaid and killed by robbers, the question arose, and was discussed, but without result, whether this was death by violent and accidental means, the court inclining, however, to the opinion that it was; and to define an accident as "any event which takes place without the foresight or expectation of the person acted upon or affected by the event," in accordance with the common acceptance of its meaning amongst those who seek insurance, rather than with the more restricted limits of lexicographical definition.²

§ 521. **Railway Accident.**—A railway accident is one occurring in the course of travelling, and arising out of the fact of the journey. It does not necessarily depend on any accident to the railway or machinery connected with it.³ It is an accident which is attributable to the fact that the injured party is a passenger on the railway, and arises out of an act immediately connected with his being such passenger.⁴ It is difficult to lay down any more specific rule, because of the multiplicity of circumstances under which these accidents may occur. Much is to depend upon the circumstances of each particular

¹ *Sinclair v. The Maritime Passengers' Ass. Co.*, 7 Jur. N. S. 369.

² District Court of the United States for the Western District of Michigan, 1870, 2 Bigelow, Life and Accident Ins. Rep. 738; s. c. U. S. Sup. Ct., 2 Ins. L. J. 538.

³ Per Alderson, B., *Theobald v. The Railway Passengers' Ass. Co.*, 26 Eng. L. & Eq. 432; s. c. 10 Exch. 44.

⁴ Per Pollock, C. B., *ibid.*

case. The case last above cited was one where a passenger, in alighting at his journey's end, slipped from the carriage-step, without negligence on his part, and was injured. This was held to be an accident covered by the policy. After taking time to consider, the court, by Pollock, C. B., say : —

“The plaintiff, who was about to take a journey by means of two distinct railways, had insured himself with the defendants against death or personal injury arising from railway accident whilst travelling, the contract fixing the damage in the former event at one thousand pounds. In getting out from one of the carriages on a rainy morning, his foot slipped, whereby he was severely injured. It was conceded by the defendant's counsel that there was no negligence on the part of the plaintiff in reference to the accident. And the first question is, whether this is a railway accident within the meaning of the policy. We are of opinion that it is. However much the company may desire that we should lay down a general rule as to what is a railway accident, I do not know that we are called on, or should be doing our duty, were we to lay down any rule beyond what is necessary to decide the actual case before us. Considering the great number of particulars that may enter into the decision of questions of this nature, and the very complicated character they may assume under circumstances that at present we may not anticipate, I think (and I believe the rest of the court concur with me in thinking) that in the single instance brought before us, under certain circumstances, some of which are not of a general nature, it would be assuming too much to lay down a rule to govern all cases. On the present occasion, it is quite plain that the plaintiff was a traveller on the railway ; it is quite plain that though, at the time of the accident, his journey had in one sense terminated, by the carriage having stopped, he had not ceased to be connected with the carriage, for he was still on it. The accident also happened without negligence on his part, and while doing an act which, as a passenger, he must necessarily have done ; for a passenger must get into the carriage, and get out of it when the journey is at end, and cannot be considered as disconnected with the carriage and

railway, and with the machinery of motion, until the time he has, as it were, safely landed from the carriage and got upon the platform. The accident is attributable to his being a passenger on the railway, and it arises out of an act immediately connected with his being such a passenger. Under these circumstances we think this was a railway accident within the meaning of the policy, and consequently the action is in our judgment maintainable, and so much of this rule as prays for a nonsuit must be discharged."

And, by way of illustration at the argument, said Pollock, C. B.: "Suppose a person suddenly rose from his seat and struck his head with great violence against the top of the carriage so as to cause a contusion of the brain; would that be a railway accident?" "Or suppose," said Parke, B., "a person on getting out, not observing that the window was closed, pushed his head through the glass?" "As to railway accidents," said Alderson, B., "my notion of a railway accident is an accident occurring in the course of travelling by a railway, and arising out of the fact of the journey. It does not necessarily depend on any accident to the railway or machinery connected with it."

§ 522. **Accident — Total Disability.** — Total disability from the prosecution of one's usual employment, means inability to follow his usual occupation, business, or pursuits in the usual way. Though he may do certain parts of his accustomed work, and engage in some of his usual employments, he may yet recover, so long as he cannot to some extent do all parts, and engage in all such employments. Thus, a farmer who cannot attend to his other ordinary duties, though he may milk his cows; and a merchant who cannot get about to look after his business as he ordinarily does, though he may be able to keep his books, — are totally disabled within the meaning of such a provision.¹ And in another case,² a substantially simi-

¹ *Sawyer v. The United States Casualty Co.* (Superior Court of Mass., per Reed, J.), 8 Law Reg. n. s. 233; s. c. 1 Bigelow, Life and Accident Ins. Rep. 289.

² *Hooper v. Accidental Death Ins. Co.*, 5 H. & N. (Exch.) 545; s. c. affirmed in Exch. Ch., 6 H. & N. 839.

lar conclusion was reached as to the meaning of the words "wholly disabled." In that case, said Pollock, C. B.:—

"The action is upon a policy of insurance against injury by accident or violence, effected with the defendants, the Accidental Death Insurance Company, and the question turns upon the meaning of the conditions in this policy, 'that in case such accident or violence shall not cause the death of the insured immediately, but shall cause any bodily injury to the insured of so serious a nature as wholly to disable him from following his usual business, occupation, or pursuits, a compensation shall be paid.' The plaintiff met with a serious sprain of the ankle, in consequence of which he was unable to leave his room for some weeks, and was confined to the house for some time longer. During that time it was clear that he was 'disabled from following his usual business, occupation, or pursuits.' Was he 'wholly' disabled? In the course of the argument, Mr. Chambers admitted that if the plaintiff had been a dancing-master he would have been within the meaning of this policy. There is no sound distinction between the case of a dancing-master and that of the plaintiff, who is an attorney. For though a dancing-master with a sprained ankle cannot dance, he may play upon an instrument and instruct other people how to use their limbs in dancing. In the case of an attorney, even if he were prostrate on his bed, deprived of sense and motion; if he had lost all consciousness and power of interference, in one sense, and to some extent he might carry on his usual business and occupation, for, even if he were without a partner, the business would not necessarily be stopped, but might be carried on by his clerks. It cannot have been contemplated that in such a case no compensation should be paid. We must, therefore, endeavor to find out what is the true meaning of the language used in the policy. It may well be that the sense intended to be conveyed was, that if the person insured should be wholly disabled from carrying on his business as he usually carried it on, the company would be liable. That is the case here; the plaintiff might and could have done something which he was in the habit of doing before, but he was wholly incapable of doing that which

he usually did before. If a man is so incapacitated from following his usual business, occupation, or pursuits as to be unable to do so, he is 'wholly disabled' from following them. His 'usual business and occupation' embrace the whole scope and compass of his mode of getting his livelihood. If it be objected that this construction would lead to the result that a person slightly incapacitated would get the same compensation as one entirely incapacitated from doing any thing whatever, that is the fault of the defendants in using language of a vague and perplexing character. It appears to us they intended that when the insured was wholly incapable of performing a very considerable part of his usual business, he should receive a compensation in respect of that disablement. If it were necessary to resort to such a rule of construction (which I think it is not) in construing this policy, that construction must be adopted which is most advantageous to the insured. I think, however, that putting a reasonable construction on the language used, the parties must have meant that if the insured was so disabled as to be incapable of following his usual business, occupation, or pursuits, he would be 'wholly disabled from following his usual business, occupation, or pursuits,' and entitled to the stipulated compensation. Our judgment must therefore be for the plaintiff."

"Wholly disabled" is equivalent to quite disabled, and a man is so unless he can do what he is called upon to do in the ordinary course of his business. It is not the same thing as "unable to do any part of his business."¹

§ 523. **Accident—Total Disability.**—A case was recently presented in New York where there was a succession of accidents. The insured sprained his knee, not, however, so severely that it compelled him to suspend his usual work, which he continued for some two weeks, when a wrenching of the same knee compelled him to quit labor and totally disabled him for some time, and it was held that though if it had appeared from the nature of the first injury that the insured would at some time become incapable of labor from it, he might perhaps have recovered notwithstanding the superven-

¹ Per Wilde, B., in *Hooper v. Accidental Death Ins. Co.*, 5 H. & N. 546.

tion of the second injury. Yet as he actually continued his work after the first injury for sixteen days, and until the happening of the second injury, it could not be said that he became totally disabled by the first.¹

§ 524. **Accident — Travelling — Alighting — On Foot — Conveyance.** — A person may be said to be travelling in a carriage while alighting therefrom, until he has completely disconnected himself and landed. And an accident happening to the insured after the train has stopped at the station by slipping off the step of the car, is a railway accident in a carriage on a line of railway."² And so one is "travelling in a conveyance" provided for the transportation of passengers, if, while in the prosecution of the journey had in view when the insurance was procured, he elects to go on foot, this being a usual mode of making the transit from the steamboat wharf to the railroad station, although a conveyance by means of public hack may be had for hire by travellers so desiring to make the transit, which he might have taken.³ In this case the plaintiff was in the prosecution of his journey, and while proceeding on foot in the evening slipped and fell. The court below held that the plaintiff could not recover, but seemed to be of the opinion that if he had taken a hack, and the accident had happened during the transit, he could have recovered. The case was distinguished from that of *Theobald v. The Railway Passengers' Assurance Company*,⁴ by the fact that in that case the passenger was in the carriage, while in this case he was not. But the Appellate Court did not recognize the distinction; and held that the distance walked, if in the prosecution of the journey, and a usual mode of such prosecution, was immaterial. It may be added, that if accident in such a transit is not covered by the policy on the ground of the distinction attempted between the English and American cases, and on the ground that in the latter case there was no

¹ *Rhodes v. Railway Passengers' Ass. Co.*, 5 Lansing (N. Y.), 71.

² *Theobald v. Railway Passengers' Ass. Co.*, 26 Eng. L. & Eq. 432; s. c. 10 Exch. 44.

³ *Northrup v. The Railway Passengers' Ass. Co.*, 43 N. Y. 516, reversing s. c. 2 Lansing (N. Y.), 166.

⁴ *Ubi supra*.

actual connection with the carriage at the time of the accident, it would seem that the plaintiff could not recover, even had he taken a hack; if the accident had happened during the transit on foot from the deck of the steamer to the hack, such a rule would exclude all accidents while the passenger is on foot, though these perhaps are of most frequent occurrence, and even though they might happen in changing cars, or in passing to or from the cars at a station where a passenger may have alighted to obtain refreshment. Construing the policy so as to carry into effect the intention of the parties, inferrible from the language used as interpreted by the light of extrinsic facts presumably well known to, and taken into consideration by, both the parties, these incidental and necessary parts of the journey must be considered as covered by the policy.¹

§ 525. **Accident — Travelling in Public Conveyance — Alighting — Limit of Journey — Negligence.** — Upon the questions whether the insured is actually a traveller, and in a conveyance, the very recent and interesting case of *Tooley v. Railway Passengers' Assurance Company*² is also precisely in point. In that case the policy provided that the insurers should be liable for injuries "when accidentally received by the assured while actually travelling in a public conveyance, provided by common carriers for the transportation of passengers." The assured took passage from Chicago, having purchased a ticket for Kankakee. The train stopped at that place, and he alighted, standing in the door of the depot while the engine took water, until the train started, moving slowly to the coal-house for the purpose of taking fuel, when he walked rapidly or ran to the train, and reaching the forward platform of the rear car, threw out his hand as if attempting to get on board, when he fell between the cars and was run over, receiving injuries from which he soon after died. It was claimed that this was not an accident within the view of the policy, because it was not *in* a conveyance. But the court instructed the jury that "travelling in a public conveyance" could not be literally construed, and that if the accident happened while the insured was

¹ *Northrup v. Railway Passengers' Ass. Co.*, 43 N. Y. 516.

² *U. S. C. Ct., Southern Dist. Ill.*, 2 Ins. L. J. 275.

either getting on or off the train, or attempting to do so for any reasonable purpose incident to railway travel, it came within the terms of the policy. As the point is one now undergoing discussion, we give the most important parts of the charge, which was by Drummond, J.

“There are some general facts which cannot be controverted. John Tooley, on the 24th day of January, 1871, took from the agent of the defendant, at Quincy, Illinois, two policies of insurance at three thousand dollars each; that amount was to be paid on each policy in case of the death of Tooley within two days. It was provided that the liability should not exist unless while he was actually travelling in a public conveyance of common carriers, and in compliance with the rules and regulations; and besides, he was not to neglect the use of due diligence for self-protection.

“Tooley, on the afternoon of the 25th of January, took the Champaign accommodation train at Chicago, and proceeded to Kankakee, where the train arrived shortly after seven o'clock. It seems the practice was for the train to stop at the station, and then pass on to the coal-bin, *provided* they took the entire train beyond Kankakee. Accordingly, on this evening the train stopped at the station, and several persons left the cars, Tooley among others. The train remained at the station several minutes and took in water. The bell was then rung, the conductor signalled with his light, and the train went on to take in coal. There' was a platform extending from the station-house, alongside of the railroad track, toward the water-tank and coal-bin. When the train moved on, Tooley, who was standing by a door of the station-house, started forward on this platform to overtake the train. When he reached the train, he extended his hands to grasp the car-rails, and fell between the two passenger cars,—the train consisting of an engine, tender, baggage car, and two passenger cars. A car passed over him, and he was killed. The first question is, What was the measure of responsibility of the defendant under these policies of insurance? The language of the policies is, ‘provided always that this insurance shall only extend to bodily injuries, fatal or non-fatal, as aforesaid, when accidentally received by the

insured while actually travelling in a public conveyance, provided by common carriers for the transporting of passengers in the United States or the dominion of Canada, and in compliance with all rules and regulations of such carriers; and not neglecting to use due diligence for self-protection.'

"These are the only conditions material to be considered in the examination of this case. Tooley must have been actually a traveller in or upon the train; but it cannot be said that the responsibility ceased whenever he stepped out of the car to alight at a station, and that it never became operative again until his foot entered the car to resume his journey. That would be giving too narrow a measuring to the clause of the policy. We think that the fair construction of the liability assumed by the defendant in this respect was, that it included injuries received by Tooley while necessarily getting on or off the train as a traveller upon it.

"Secondly, and it is a question of fact, to be determined by the jury, was Tooley, at the very time that the injury was received by him, a traveller on the train? And this will depend upon the fact whether his journey terminated at Kankakee. It is claimed on the part of the defence that that was the termination of his journey; and if so, then he was not a traveller on this train at the time of the accident.

"I will call your attention to some of the facts having a bearing on this question. The conductor states, in his evidence, that when he took up the tickets of the passengers, Tooley's ticket was only for Kankakee. That is a fact proper to be considered by the jury, in order to determine whether or not his journey extended beyond Kankakee,—not conclusive, of course, because, as a matter of experience, we know that where men commence a journey, they do not always buy their ticket to the termination of the journey, and various circumstances may happen during the progress of a journey which change the purpose of the traveller. He may start with the intention of only proceeding to a certain point. During the journey he may change his mind and proceed further on. There are many reasons, to which it is unnecessary to call your attention, which indicate that this is only one incident having a bearing upon

the main fact of this part of the case, whether or not his journey terminated at Kankakee.

“ Mr. Merwin states in his evidence — the truth of which is a question for the jury — that, in a conversation he had with Tooley, he said that he intended or expected to go to Mattoon, which was south of Champaign, where the train stopped. The way that arose was this: it was in relation to the seats; he wanted two seats, as he said, so that he could sleep, as he ‘ thought or expected to go to Mattoon.’

“ Now as qualifying this, perhaps, and to some extent inconsistent with the statement of Merwin, is that of the conductor. The conductor says that twice, just before they arrived at Kankakee, he woke up Tooley, and told him that the next station was Kankakee; and there was no remark made by him intimating in any way that he intended to go further than Kankakee, and therefore it was not necessary for him to be disturbed. It is for you to say how much bearing this may have upon the question whether his journey terminated at Kankakee, and how far it may affect the statement of Merwin. There is this other fact, that when the train started at Kankakee, Tooley attempted to get on it. That is claimed to be conclusive evidence of his purpose to proceed further. It is for you to say what bearing that may have upon this particular question that we are now considering. Then, again, in relation to whether or not he had any baggage with him. It is said that there was a satchel or valise there, and that it was not found after his death. How far this may have any bearing upon the question is a matter to be determined by the jury. The only light in which it is material this question should be considered is, how far it may affect the conduct of Tooley on the general question of negligence. If his journey ceased at Kankakee, then it cannot be claimed, under the undisputed facts of this case, that the defendant would be liable, because, on the assumption that he was going no further than Kankakee, in attempting to get on the train as he did, it was at his own risk.

“ If he was going beyond Kankakee on the train, then there are other considerations which may affect the question of negligence. According to the view which we take of the contract

between the parties, if he were a passenger proceeding beyond Kankakee on the train, he had the right to leave the car at Kankakee and return to it; that is to say, he had the right to get off of the train,—he was not bound, in other words, to remain inside of the car all the time. There is, perhaps, one circumstance which I ought to refer to in connection with the question of the termination of the journey at Kankakee, and it is this: that he did not purchase a ticket at Kankakee, and it is in evidence that the train stopped there several minutes; and if you believe the testimony on this point, he certainly had ample time to purchase a ticket before the train started on to obtain coal. Still that, of course, is not conclusive. He had the right, I suppose, under the practice and management of the train, to pay his fare on the cars. It is only a circumstance to be taken into consideration by the jury. One of the conditions of these policies is, as has been stated, that Tooley should comply with all the rules and regulations of common carriers. We are not prepared to say that it was incumbent on him, under the circumstances of the case, to make himself acquainted with all the rules which might be contained upon the time-card. We must give this clause of the policy a reasonable construction. A policy was issued, we suppose, to any applicant. It is what is called an accident policy, and we are to infer that the meaning of this clause was that the traveller should only make himself acquainted with those general rules, as to the management of the trains, and the conduct of railroads, which are presumed to be known to travellers, under these circumstances. For instance, Tooley, as far as we know, was a stranger on this road. We cannot say that when he went on the train he was obliged, because of this clause in the policy, to examine the time-card and ascertain all the minutiae connected with the management of trains, but only such rules as a general traveller might be presumed to know and ought to know. Any other construction than this would operate as a snare upon travellers. To hold that the traveller must become acquainted with every minute rule which may be prescribed on the back of a time-card, we think cannot be said to be the true meaning of this clause of the policy. But perhaps if he

did not know the time the train stopped at a particular place, there might be a question whether it was not his duty to make some inquiry of the employés of the train, the conductor, or others.

“ It is to be observed, in deciding this question of the negligence of Tooley, which is the last question to be considered, and to which I call the attention of the jury, that this is not an action between the representative of Tooley and the railroad, but between the representative of Tooley and the underwriters upon this clause in the policy, ‘ not neglecting to use due diligence for self-protection.’ And perhaps there can be no better rule stated than that which was agreed upon by the counsel, namely, that it was his duty to use that degree of caution and diligence which a prudent man would use under the circumstances in which he was placed ; we think, also, in order to determine this question of diligence on the part of Tooley, it is proper to take into consideration whether or not, when he alighted at Kankakee, which he had a right to do, any notice was given of the movement of the train. That may be an element which may have a bearing upon the question whether he was negligent or not. Was there any notice given, either by the ringing of a bell, or by word of mouth from the conductor or any of the employés of the company ? If a person, having a right to leave a train at a station, is informed or notified in any way that the train is going to start, and an opportunity given to him to take his place again upon the train, and he chooses to remain until the train is put in motion, and then is injured in getting on the train, it may be said that he is negligent, — in other words, that he takes the risk of getting on the train while thus in motion. But if, having alighted at a station, he has no notice given to him of the movement of the train, or he has not the opportunity, after notice is given, to get on the train, and intending to go further he attempts to get on the train and is injured, we think there is not the same measure of responsibility upon him, — in other words, that the question of negligence is not to be tried by the same tests precisely, because we must make some allowance under some circumstances. It would be natural for a man, — for even a

prudent man,—intending to go farther on the train, to make an effort, even when the train is in motion, to regain his place on the train.

“ But while that is so, it is to be understood he must use due diligence in trying to get on the train, and to that question I will now direct your attention for a few moments, on the supposition that he intended to go farther, and he had not an opportunity to get on the train, or he was not notified that the train was about to move. It was after seven o'clock in the evening. Tooley proceeded along the platform. There has some question been made whether the bell was rung. We think it perhaps ought to be assumed in this case that that fact has been established. It is proved that was the practice of the engineer just before the train started ; that it was a signal to the conductor that the engineer was ready to proceed. It is also distinctly sworn to by the conductor that the bell was rung, and it is a fact stated by one or two of the witnesses that the remark was made, ‘ the bell is ringing,’ which, under the circumstances, of course is a very material fact. This is not otherwise contradicted than by the statements of several witnesses that they did not hear, or do not recollect that they heard, the bell. However, we leave this question to be determined by the jury. Of course, negative testimony is not so material or important as positive testimony, if you believe that these witnesses stated the truth. There is some controversy as to the character of the night. Several of the witnesses say that it was a clear night ; some that it was moonlight ; and some state that it had been snowing or storming. There is no doubt of this fact, or I think we may assume it, that the intent of Tooley was, when he heard the bell, or an intimation was given in that way, or by the movement of the cars, to get on the train. He proceeded rapidly along the platform. He tried to get on the train. Now did he act prudently, as a prudent man, in getting on the train ? Mr. Lawrence says, when he came around the corner of the station-house, and he saw a man running or walking fast, that he called out to him that the train was only going to coal up, or something to that effect. Now it is true that Mr. Tooley was not bound to take any dec-

laration made by an outsider or an indifferent person as true, in relation to the train or its motions. The only effect of that is this : that it changes the measure of his responsibility, and gives color to his conduct, to his action. And you are to treat it in a different manner from what you would provided he had no intimation whatever given to him ; because, if a man, after being notified of a particular fact, which should govern or rule his conduct, chooses to act in such a way as to encounter risk or danger, you will see that the rule of diligence is different. It is material for the jury to consider this in that light alone. And then it will be a question, as far as it bears upon the conduct of Tooley, whether or not he heard what was said by Mr. Lawrence, and of course it is simply a matter of inference whether or not he did hear ; positively we cannot know. This seems to be certain, that words or the sound attracted his attention, as he turned round ; and it is for you to say whether he heard, in such a way as to give him warning, that the train was not to go farther than the coal-bins,—whether or not he heard the language, or whether he heard a sound merely, without distinguishing or understanding what was said. All these are to some extent matters of conjecture, and it is for the jury to determine how far they may affect this question. He passed by the rear platform of the rear car ; we think that is a fact to be taken into consideration by the jury in determining whether he did or did not act as a prudent man, if he believed that the train was going on, and wanted to get on the train to resume his journey. Of course you will understand that the danger was much less in getting on the rear platform than on the forward platform of the car. The fact is, that he did not attempt to get on the rear platform of the car. The train was moving slowly. It does not appear that he was actually running, although walking very fast. He attempted to get on to the cars, either on to the forward platform of the rear car, or between the two cars. If, in point of fact, when he slipped and fell he was attempting to get on between the cars, it is difficult to reconcile it with our ideas of prudence on the part of any man under such circumstances. That may be an important fact for you to inquire into,—whether that is so or

not, as I believe it is stated by one of the witnesses. It is very much a question for the jury, under these rules which the court has laid down, whether this man, under the circumstances, conceding that he was going further, acted prudently ; whether or not he was guilty of negligence. It is, perhaps, natural that the sympathies of a jury should be enlisted in favor of the man, or his representatives, or family ; but this case, like every other, has to be decided under the law and facts, and you are to apply your best judgment and intelligence to the facts, taking the law from the court, and drawing your conclusions upon those facts, without being influenced or biased by the relative positions of the parties. This is your imperative duty, and if you do any less than this you do not come up to the measure of your responsibility. It is not a question of sympathy or feeling, but of law and evidence. I will dismiss the case with one further remark. There has not been any light thrown upon the motives of the journey of Tooley from Chicago to Kankakee. We were left in ignorance of that when we tried this case before, and we are now just as ignorant. It may be that there is an impenetrable mystery hanging over this journey. It is said that he was going to Nokomis, in Montgomery County, which was his residence. In point of fact, when he was required to give his residence, as a memorandum on the policy demanded, he gave it as Topeka, Kansas, not Nokomis, Montgomery County, Illinois. Of course this is no further material than as it may have a bearing upon the journey of Tooley. It is in one sense no matter of ours, or of these defendants, where he was going. That was not the question. He was insured for the two days, wherever he might go. There is nothing stated in these policies as to the proof of loss or damage, as the case might be, or as to the time within which the payment would be made if there were damage. It has been admitted that notice was given ; so as to that there is no controversy. The policy required that notice should be given. Then we understand that the true construction of it would be that, if notice were given, it was the duty of the company to pay within a reasonable time, and interest would run from the expiration of that time when the payment ought to be made."

§ 526. Accident — Travelling — Conveyance — Engineer. — A railway passengers' insurance company which insures against "any accident while travelling by public or private conveyance," is liable for the death of an engineer actually engaged in running trains, by an accident occurring on the railroad upon which he is employed. So it was held in *Brown v. The Railway Passengers' Assurance Company*.¹ "The main point," say the court in giving the opinion, "is whether the intestate, Brown, was killed by an accident which is covered by the policy. The clause insuring him provides that the death must be "caused by an accident while travelling by public or private conveyance provided for the transportation of passengers." It is strongly contended that a locomotive or engine is not a conveyance provided for the transportation of passengers. This is certainly true; and if the ticket applies solely and exclusively to passengers or travellers, the position that the company is not liable cannot be controverted. A passenger would have no right to go upon an engine, and if he was so indiscreet as to venture on such a place, and injury ensued, he would not be protected. But this ticket was designed to include and serve something more than the ordinary risk incurred by the passenger or traveller. The locomotive is a necessary part of the conveyance. The ticket was a general ticket, as contradistinguished from a mere passenger or travelling ticket. The premium on one is double what it is on the other. When the ticket was sold it was known that Brown was an engineer, and the conclusion is unquestionable that he believed that he was insured while pursuing his employment or occupation. The company so thought; for it gave no instructions against insuring railroad employes till after the disastrous accident happened. . . . As Brown was not insured as a passenger or traveller, but against all accidents without regard to the capacity in which he was acting, the reasonable inference is, that the ticket was intended to cover the risk and accident by which he met his death. If it be conceded that the meaning of the ticket is doubtful or ambiguous, still the question must be decided for the plaintiff, as the promisor could not fail to

apprehend that the promisee labored under the impression that he was indemnified, and where such is the case, the construction must be most favorable to the insured."

§ 527. The case cited in the last section has been criticised¹ as founded upon an obvious misapprehension, the court having mistaken a "traveller's risk," which this was, for a "general accident" risk, which it was not. However this may be, it seems well decided upon the contract itself. The insured was clearly travelling by a conveyance provided for the transportation of passengers, unless it be said that a person whose business requires him to travel all the time is less a traveller than one whose business requires him to travel only occasionally. He may not have been a passenger, but he clearly was a traveller, liable to all accidents which threaten travellers, and presumably purchasing under the same contract the same protection. Would it be pretended that a stage-driver purchasing a like ticket at the same time with the passengers is not entitled to the same protection? The suggestion of the court that the engineer had greater rights under such a contract than a passenger would have, seems more open to criticism. Though the court seems to have conceded, inadvertently, perhaps, that a locomotive is not a conveyance, it almost immediately adds, what is obviously true, that a locomotive is a necessary part of the conveyance. Certainly cars without a locomotive could not be said to be a conveyance provided for the transportation of passengers, any more than a carriage without a horse, or a steamboat without an engine. No doubt all the parts of a train of cars constitute the conveyance, and unless the insured is restricted by the terms of the contract to some particular part, it would seem that whoever holds a ticket may recover without reference to the particular part of the conveyance he may have been on at the time of the accident. If he be anywhere on the conveyance—even though negligently, yet without misconduct or fraud²—at the time of the accident he is within the terms of the contract; so that whether the passenger be on the engine, or the engineer on some other part of

¹ See American Law Review, July, 1873, art. Accident Insurance.

² See *ante*, §§ 408-411, and *post*, § 529.

the train for the time being, their rights and obligations under the contract being the same, would be questions of no moment. There seems, therefore, to be no ground for the distinction suggested between the rights of a passenger and those of the engineer, unless there is something in the contract to require it. Even under the very doubtful¹ doctrine of contributory negligence, though, perhaps the passenger might fail to recover, so also might the engineer if the accident happen by reason of his being somewhere else than upon the engine. Certainly an insurance company ought not to be allowed to issue such a ticket to an engineer, known to be such, and then to say if he stays upon the engine and attends to his duties he is not within the terms of the policy, but if he does not stay upon the engine then the accident happens through his neglect, and therefore he cannot recover, unless the policy which they have issued gives them such advantages in terms so clear and unequivocal as to admit of no other possible construction.

§ 528. **Accident — Travelling on Foot — Conveyance.** — On the other hand, it has been held that travelling on foot is not travelling by private conveyance within the meaning of a policy insuring against accidents while “travelling by public or private conveyance.” In this case the plaintiff had completed the greater part of his journey by steamer, and there being no public conveyance, was proceeding on foot to his home some few miles distant from the port where he left the steamer.² Conveyance, as a mode of travelling, in its ordinary and popular acceptation, it was said in that case means a vehicle or instrument of conveyance other and different from the person or thing to be conveyed; and it cannot properly be said that a man walking on foot is a private conveyance to himself. And this case was affirmed in the Supreme Court of the United States,³ Chase, C. J., giving the opinion, which, after stating the case, concluded as follows: —

¹ See *post*, § 529.

² *Ripley et al. Adm. v. Railway Passengers' Ass. Co.*, U. S. Dist. Ct. Western Michigan, 1870, 1 Dillon (U. S. C. Ct., 8th Circuit), 403.

³ 15 Wall. (U. S.) 580.

“ The question is whether, when he (the plaintiff) received the injuries, he was travelling by public or private conveyance. That he was *travelling* is clear enough ; but was travelling on foot travelling by public or private conveyance ? The contract must receive the construction which the language used fairly warrants. What was the understanding of the parties ? or, rather, what understanding must naturally have been derived from the language used ? It seems to us that walking would not naturally be presented to the mind as a means of public or private conveyance. Public conveyance naturally suggests a vessel or vehicle employed in the general conveyance of passengers. Private conveyance suggests a vehicle belonging to a private individual. If this was the sense in which the language was understood by the parties, the deceased was not, when injured, travelling within the terms of the policy. There is nothing to show that it was not.”

§ 529. Such, undoubtedly, is the logical consequence of a strict interpretation of the letter of the contract, and the exact point made was doubtless well decided. But we venture to suggest the inquiry whether the construction is not too literal and narrow. Upon the principle of the cases cited in the last two sections, the plaintiff being engaged in the actual prosecution of his journey, and by the appropriate and usual means, might have been held to be travelling by public conveyance, for it was by public conveyance that the journey was accomplished. And this is strictly in accordance with the ordinary use of language. A man who goes on a journey is said to be travelling. If he goes by rail or steamer, he is travelling by public conveyance. More or less travel on foot is necessary to this mode of travel in changing cars, or passing from steamer to railway, or in getting to and from the stations. But, in a general sense, all this is travelling by public conveyance. It would seem to be immaterial whether the walking be done in the middle or at one of the termini of the journey, provided it be incidental to, and part of, the journey ; nor can the distance walked make any difference, provided it also is a part of the journey. By the same literalness of construction

a passenger sitting still in a train stopping at a station, and not under motion, might be injured by a train in motion, and yet have no claim, because he was not actually travelling, — for sitting still is not literally travelling. So a passenger required to leave one car and to get into another, or to go from one train to another at the same station, or going to, or returning from, the refreshment-room, being on foot during the process, is certainly not literally “in a conveyance.” But is he not travelling all the while, in a general and substantial sense, in the prosecution of his journey, in and by a public conveyance? Is not one who stands upon the platform at a way station, having left the car for refreshments, and is knocked down and injured by the rushing throng, within the protection of such a policy, although at the moment, in a literal sense, he is neither travelling by a conveyance, nor in any other way? May not a man be said to be travelling by public conveyance, who is actually engaged in and about doing certain acts which are fairly incidental to, and necessary for, the prosecution or completion of the journey? The bare question whether a man going on foot is going by conveyance must undoubtedly be answered in the negative. But the broader question whether a man who is prosecuting a journey by railway and steamboat, while engaged in what is incidental to the journey, whether he is sitting still in a motionless car, or standing still on the station platform, or walking to and fro thereon, waiting for a start, or going into the station for refreshments, or returning therefrom after having obtained them, may not in a reasonable and substantially accurate sense be said to be “travelling by public conveyance,” may, perhaps, require an affirmative answer.

§ 530. **Accident — Negligence — Wilful Exposure.** — It has been held that if the injury is attributable to the insured's own negligence, it is not accidental, as when a passenger inadvertently, but needlessly, puts his arm out of the car window while the train is running with its usual velocity, whereby his hand is injured by contact with a post standing near the track.¹ And the case of *Theobald v. Railway Passengers' Assurance*

¹ *Morel v. The Mississippi Valley Life Ins. Co.*, 4 Bush (Ky.), 535.

Company¹ has been supposed to support the same doctrine. But the point was not decided, the court merely adverting to the fact that the plaintiff was without negligence. In *Brown v. Railway Passengers' Insurance Company*,² it was also suggested that the negligence of a passenger having a "traveller's ticket" might defeat his recovery. But that was not a point in the case; and the case from Kentucky stands alone, without the support of any authority, and is based, it is conceived, upon a mistaken application, in an action upon contract, of the doctrine of contributory negligence as it is applied in actions upon tort. Indeed, there is no reason for supposing that protection from loss or injury from negligence is not one of the motives which operate in accident, as well as in fire and life insurance. And unless there are stipulations to the contrary in the policy, in accident insurance, as in life and fire insurances, injury by negligence is covered by the contract;³ nor will ordinary negligence vitiate a policy which stipulates that the company will not be liable for wilful and wanton exposure to unnecessary danger, as this stipulation affords a reasonable inference that ordinary negligence is not excepted.⁴ In this case the plaintiff attempted to get upon a train of cars while they were in slow motion, and fell under them and was killed. The opinion of the court we give at some length, as involving an interesting discussion of the relation of negligence to insurance against accidental injury and death, the scope and meaning of the word "accident," and the grounds upon which the doctrine of contributory negligence, as applied in actions of tort, is not applicable in cases of insurance. The opinion was by Paine, J. : —

"The position most strongly urged by the respondent's counsel in this court was, that inasmuch as the negligence of the deceased contributed to produce the injury, therefore the death was not occasioned by an accident at all, within the meaning of the policy. I cannot assent to this proposition. It would establish a limitation to the meaning of the word

¹ 10 Exch. 44; s. c. 26 Eng. L. & Eq. 432.

² 45 Wis. 221.

³ See *ante*, § 408 *et seq.*

⁴ *Schneider v. The Provident Life Ins. Co.*, 24 Wis. 28.

‘accident,’ which has never been established either in law or common understanding. A very large proportion of those events which are universally called accidents happen through some carelessness of the party injured, which contributes to produce them. Thus men are injured by the careless use of firearms, of explosive substances, of machinery, the careless management of horses, and in a thousand ways where it can readily be seen afterward that a little greater care on their part would have prevented it. Yet such injuries having been unexpected, and not caused intentionally or by design, are always called accidents, and properly so. Nothing is more common than items in the newspapers under the heading, ‘accidents through carelessness.’

“There is nothing in the definition of the word that excludes the negligence of the injured party as one of the elements contributing to produce the result. An accident is defined as ‘an event that takes place without one’s foresight or expectation ; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected.’

“An accident may happen from an unknown cause. But it is not essential that the cause should be unknown. It may be an unusual result of a known cause, and therefore unexpected to the party. And such was the case here, conceding that the negligence of the deceased was the cause of the accident.

“It is true that accidents often happen from such kinds of negligence. But still it is equally true that they are not the usual result. If they were, people would cease to be guilty of such negligence. But cases in which accidents occur are very rare in comparison with the number in which there is the same negligence without any accident. A man draws his loaded gun toward him by the muzzle, the servant fills the lighted lamp with kerosene a hundred times without injury. The next time the gun is discharged, and the lamp explodes. The result was unusual, and therefore as unexpected as it had been in all the previous instances. So there are, undoubtedly, thousands of persons who get on and off from cars in motion without accident, where one is injured. And, therefore, when

an injury occurs, it is an unusual result, and unexpected, and strictly an accident. There are not many authorities on the point. The respondent's counsel cites *Theobald v. The Railway Passengers' Assurance Company*,¹ not as a direct authority, but as containing an implication that the negligence of the injured party would prevent a recovery. I do not think it can be construed as conveying any such intimation. The insurance there was against a particular kind of accident, — that was a railway accident; and the only question was, whether the injury was occasioned by an injury of that kind. The court held that it was, and although it mentions the fact that there was no negligence on the part of the assured, that cannot be considered as any intimation what would have been the effect of negligence, if it had existed.

“The general question as to what constitutes an accident was considered in two subsequent cases in England. The first was *Sinclair v. The Maritime Passengers' Assurance Company*,² in which the question was, whether a sunstroke was an accident within the meaning of the policy. The court held that it was not, but was rather to be classed among diseases occasioned by natural causes, like exposure to malaria, &c.; and while admitting the difficulty of giving a definition to the term ‘accident’ which would be of universal application, they say they may safely assume ‘that some violence, casualty, or *vis major* is necessarily involved.’ There could be no question in this case, of course, but that all these were involved.

“In the subsequent case of *Trew v. Railway Passengers' Assurance Company*,³ the question was whether a death by drowning was accidental. The counsel relied on the language of the former case, and urged that there was no external force or violence. But the court held that if the death was occasioned by drowning, it was accidental, within the meaning of the policy. And in answer to the argument of counsel, they said: ‘If a man fell from a housetop, or overboard from a ship, and was killed; or if a man was suffocated by the smoke of a house on fire, such cases would be excluded from the

¹ 26 Eng. L. & Eq. 432.

² 107 E. C. L. 478.

³ 6 H. & N. 839.

policy, and the effect would be, that policies of this kind, in many cases where death resulted from accident, would afford no protection whatever to the assured. We ought not to give to these policies a construction which will defeat the protection of the assured in a large class of cases.'

"There was no suggestion that there was any question to be made as to the negligence of the deceased; and yet the court said: 'We think it ought to be submitted to the jury to say whether the deceased died from the action of the water, or natural causes. If they are of the opinion that he died from the action of the water, causing asphyxia, that is a death from external violence, within the meaning of this policy, *whether he swam to a distance and had not strength enough to regain the shore, or, on going into the water, got out of his depth.*'

"Now, either of these facts would seem to raise as strong an inference of negligence, as an attempt to get upon cars in slow motion. Yet the court said that although the drowning was occasioned by either one of them, it would have been an accidental death within the meaning of the policy, and the plaintiffs entitled to recover. I cannot conceive that it would have made such a remark, except upon the assumption that the question, whether the injured party was guilty of negligence contributing to the accident, does not arise at all in this class of cases. I think that is the true conclusion, both upon principle and authority, so far as there is any upon the subject; and the only questions are, first, whether the death or injury was occasioned by an accident within the general meaning of the policy, and, if so, whether it was within any of the exceptions.

"This conclusion is also very strongly supported by that provision of the policy under which the plaintiff was nonsuited. That necessarily implies that any degree of negligence, falling short of 'wilful and wanton exposure to unnecessary danger,' would not prevent a recovery. Such a provision would be entirely superfluous and unmeaning in such a contract, if the observance of due care and skill on the part of the assured constituted an element to his right of action, as it does in actions for injuries occasioned by the negligence of the defendant.

“The question therefore remains, whether the attempt of the deceased to get upon the train was within this provision, and constituted a ‘wilful and wanton exposure of himself to unnecessary danger.’ I cannot think so. The evidence showed that the train, having once been to the platform, had backed so that the cars stood at some little distance from it. While it was waiting there, the deceased was walking back and forth on the platform. It is very probable that he expected the train to stop there again before finally leaving. But it did not. It came along, and while moving at a slow rate, not so fast as a man would walk, he attempted to get on, and by some means fell either under or by the side of the cars, and was crushed to death. The act may have been imprudent. It may have been such negligence as would have prevented a recovery in an action based upon the negligence of the company, if there had been any. But it does not seem to have contained those elements which could be justly characterized as wilful or wanton. The deceased was in the regular prosecution of his business. He desired and expected to leave on that train. Finding that he would be left unless he got on the train while it was in motion, it was natural enough for him to make the attempt. The strong disinclination which people have to being left, would impel him to do so. The railroad employes were getting on at about the same time. Imprudent though it is, it is a common practice for others to get on and off in the same manner. He had undoubtedly seen it done, if he had not done it himself, many times, without injury. I cannot regard it, therefore, as a wilful and wanton exposure of himself to unnecessary danger, within the meaning of the policy.”

And this case was cited and approved in the *Providence Life Insurance and Investment Company v. Martin*,¹ where the policy provided that the company should not be liable in case the insured received injury “by his wilfully exposing himself to any unnecessary danger or peril,” and where the facts were that the assured was a locomotive engineer, in the employ of a railroad company, whose principal business was

¹ 32 Md. 310.

the transportation of coal, and whilst backing his engine upon a down grade, with a car in front as a precaution to check the speed, he directed the fireman to run it, and went upon and over the tender to get into this car to draw the brakes, and in doing so slipped and fell between the car and the tender, and was instantly killed by the tender passing over his body. The speed at the time was about eight miles per hour, on a descending grade. It was also distinctly asserted in this case that contributory negligence was no defence, as the liability rests upon contract, one of the chief objects of which is to protect the insured against his own mere carelessness or negligence.¹

§ 531. **Accident — Condition to be Careful.** — But policies sometimes contain provisions which look to a protection from liability for injury by negligence, as the stipulation that the insured shall be careful for his safety. What amounts to the violation of a stipulation in an accident policy that the insured shall “use all due diligence for his personal safety and protection,” is to be deduced from all the facts and circumstances accompanying the accident, and, like questions of negligence and due care generally, is to be determined by the jury. The court will not undertake to say, as matter of law, whether a particular act, or series of acts, constitutes a want of such due diligence.²

¹ And see also *ante*, § 301 and § 408 *et seq.* In *Pratt v. Travellers' Ins. Co.*, a *novi prius* case tried in the Supreme Court in New York, in Oct. 1871, cited by a very careful writer in the *American Law Review*, for July, 1873, under a policy which exempted the insurers from liability if the insured was guilty of a violation of any rule of any company, or in case of wilful exposure or want of due care, the jury were charged that if the insured was standing on the platform in violation of the rules of the railway company, he could not recover; if he was passing from one car to another, it was for them, upon all the circumstances, to say whether he used due care or not. And in another case cited by the same writer, *Hoffman v. Travellers' Ins. Co.*, in the same court, but on a different circuit, the court held, as matter of law, that attempting to cross a railroad track, when an approaching train was within fifty to one hundred feet, was a violation of a condition to use all due diligence for personal safety. It was “as gross negligence,” the court is reported to have said, “as if the man had hanged himself.” The facts were no doubt such as to have justified a jury in finding a verdict for the defendant; though upon the last proposition there might be a difference of opinion. The doctrine of the case cited in the next section seems the better.

² *Adm'rs of Stone v. United States Casualty Co.*, 34 N. J. (5 Vroom) 371.

§ 532. **Accident Insurance — Increase of Risk — Change of Occupation.** — A change of occupation on the part of a person insured against injury by accident does not mean a casual change, such as most men do, or may resort to, during the intervals of time when their usual employment does not engage them, but rather “engaging in another employment as a usual business.” An unemployed teacher, therefore, does not forfeit his right to recover because he meets with an accident while superintending the erection of a building for himself.¹ Nor does a person who, while on a visit to a friend who was a farmer, meets with an accident while casually assisting him in getting in hay, though farming is not his usual occupation.² A statement by the insured in his application as to his occupation is a representation of the then existing fact, and not a covenant or warranty that there shall be no change in the occupation affecting the risk during the currency of the policy. And a change in the occupation, as, for instance, from the occupation of a switchman to that of a brakeman, whether affecting the risk or not, does not avoid the policy, unless expressly so stipulated, or unless liability is restricted to accidents occurring in the course of the occupation specified in the application.³ And for the same reasons an engineer on a railway train may temporarily perform the duty of an absent brakeman without forfeiting his right to recover.⁴

§ 533. **Accident — Increase of Risk — Classification of Risk.** — In *Stone v. United States Casualty Company*,⁵ where the policy required notice of change of occupation “to a more hazardous exposure under the company’s classification than is named in the application,” the form and effect of the following indorsement upon the policy, — “Policy holders insured under the preferred class will not be entitled to recover for injuries received in any employment, or by any exposure either more hazardous in itself, or classified by the company as more haz-

¹ Adm’rs of *Stone v. United States Casualty Co.*, 34 N. J. (5 Vroom) 371.

² *North American Ins. Co. v. Burroughs*, 69 Penn. St. 43.

³ *The Provident Life Ins. Co. v. Fennell*, 49 Ill. 180.

⁴ *Prov. Life Ins. and Inv. Co. v. Martin*, 32 Md. 310.

⁵ 34 N. J. 371.

ardous than the occupations named in the preferred class," came under consideration, and the conclusion was, first, that the language has respect to hazardous employments, and not to hazardous individual acts; and, secondly, that, being so indorsed on the policy, it constitutes no part of the contract. "The injuries excluded from the compensation of the policy," say the court, by Beasley, C. J., "are described as those that are 'received in any employment, or by any exposure either more hazardous in itself, or classified by the company as more hazardous.' These terms, literally rendered, require that the assured, to come within their effect, must, at the time of the injury, be in an employment more dangerous than his own. The language has respect to employments, and not to individual acts. It is true that a certain degree of ambiguity is introduced by the expression 'other exposure,' but, looking at the body of the policy, we find these terms used in the sense of the risks arising from a business or occupation. By adhering to the literal signification of the terms employed, these indorsements prefixed to the several classes of employments lose all force as independent stipulations, and serve the simple purpose of graduating such employments for the service of that provision of the policy which prohibits the assured from passing, at his own option, from one business to another. Understood in this view, they are properly a part of the classification, but if they are to be received as containing new terms of the contract, they are entirely out of place. If the company intended to say to the assured that if he did any act which did not strictly belong to his own occupation, but was embraced more properly in some other business, and if thereby any harm to him accidentally resulted, that in such event he could claim nothing under his policy, it was easy for them to do so in plain language. Such a stipulation would obviously be one of a very important character, and we would expect to find it in the body of the instrument. A qualification of the agreement so restrictive of the rights of the party insured ought not to be admitted, unless the terms of this indorsement will bear no other rational interpretation. If the terms used are imperfect or ambiguous, it is the fault of the defend-

ants; it is their contract, and the construction of it must be strongly against them, *contra preferentes*. Nor do I think the liberal interpretation of this clause, which the defence contends for, a practical one. It would be difficult to put it in practice; for who can say, in many cases, what acts are properly incident to one occupation, and which are not so to any other? The subdivisions of employments are so numerous and minute, that in actual life it is impossible to separate them by any visible and exact line; for instance, in the first of these classifications the shopkeeper is placed, and in the second the laborer. The employments of these are distinct; but with respect to particular acts it would be extremely difficult, if not impossible, to classify them into those which are common to both occupations, and into those which are peculiar to each. It does not seem to me proper to bring into this agreement this confusion and uncertainty by construction. It certainly is not necessary for the reasonable protection of the company, for there are other restrictions in this instrument which are, apparently, sufficient to debar a party insured from doing acts appertaining to other occupations, which are of a particularly hazardous nature. I refer to the clauses referring to undue exposure. Even the case put of an attorney driving a steam-engine would probably come within this prohibition.

“ But there is still another, and, as it seems to me, a decided objection against the admission of this indorsement, as constituting in itself a substantive agreement. That objection is this: that considered in this light it cannot be received as any part of the contract between these parties. As I have stated, this clause is a prefix to the classification on the back of the policy, and such prefix is not referred to in the body of the instrument. The policy itself is very explicit as to what shall be comprised in the contract. Its language is, that this policy ‘is issued and accepted subject to all the provisions, conditions, limitations, and exceptions herein contained or referred to, and upon the express agreement that the statements and declarations of the insured in his application for this insurance are warranted to be true in all respects, and that said application, together with the company’s classifications of hazards

indorsed hereon, are referred to, and made a part of, this contract. This specification of the parts going to make up the agreement is clear, and it does not embrace this prefix in question, if such prefix is to be taken as a modification of the body of the policy in a most material respect. On these various grounds I incline to the view that the indorsement in question does not constitute a substantive stipulation, but is merely explanatory of the stipulations to the extent already indicated."

§ 534. **Accident — Extent of Risk.** — Insurance against injury by accident includes all accidents not excepted by the terms of the policy.¹ A general insurance, however, against death by "violent and accidental means," followed by a proviso that the insurers will not be responsible for death caused by certain specified means, or happening in certain specified modes, must be construed as covering injuries happening by violent and accidental means, and not by the causes and modes specified in the excluding proviso. The exclusion of responsibility for death or injury in certain specified ways does not enlarge the scope of the general clause so as to include cases happening otherwise than by violent and accidental means.²

§ 535. **Accident Insurance — Insurable Interest — Amount of Loss.** — Every person is presumed to have an insurable interest in his own life, and in his personal safety and security from injury.³ Where a policy insures for a stated period against two classes of accidental injuries, namely, those which occasion loss of life within ninety days, in a gross sum, and those which shall not prove fatal, in a certain sum per week for a fixed number of weeks, the two provisions are to be construed together. If an injury happens, it is insured against under one class or the other, and if a recovery cannot be had under the first class for the gross sum, then it may be had under the second class for the weekly allowance. If it were otherwise, an injury which should not prove fatal in ninety days would furnish no ground of action till it should be made to

¹ *Prov. Life Ins. Co. v. Fennell*, 49 Ill. 180; *Same v. Martin*, 32 Md. 310.

² *Southard v. The Railway Passengers' Ass. Co.*, 34 Conn. 574, per Shipman, Judge of the District Court of the United States, acting as arbitrator, *ante*, § 515.

³ *Prov. Life Ins. and Inv. Co. v. Baum*, 29 Ind. 236.

appear that it would never prove fatal, — a construction which would render the insurance nugatory in such cases.¹ In such a case the lapse of the ninety days is to be determined by including the day when the accident happened as one of the ninety days, in accordance with the rule that when time is reckoned from an act done, it includes the day when the act is done ; but when it is reckoned from the day when the act is done the day is excluded. And a death happening within ninety days from the time of the accident, though after the expiration of the period covered by the insurance, if the accidental cause be within that period, affords ground for recovery.² If the policy stipulated for the payment of a fixed sum in the case of death by accident, and for a proportionate sum in the case of merely personal injury, not fatal, the amount to be recovered is not to be estimated by the proportion which the injury bears to the amount payable in case of death. The insured may recover for the expense and suffering occasioned, but not for loss of time or profits. If recovery could be had for a consequential loss of profits, a person whose time or business is more valuable than another's, might, for the same injury, receive a greater remuneration. The insurers indemnify against the expense and pain and loss immediately connected with the accident, and not against remote consequences that may follow, according to the business or profession of the insured.³

§ 536. **Accident — Notice of Death — Preliminary Proof.** — The general rules heretofore stated as to preliminary proof in other branches of insurance are also applicable here.⁴ “Sufficient proof of the injury” does not include the mode and manner of the injury or its cause. Nor will a statement in the preliminary proofs of two inconsistent causes of the injury, the injury itself being correctly stated, prejudice the right of the insured to recover.⁵ In *Gamble v. Accident Assurance*

¹ *Perry v. Prov. Life Ins. and Inv. Co.*, 103 Mass. 242; *Same v. Same*, 99 Mass. 162.

² *Ibid.*

³ *Theobald v. Railway Passengers' Ass. Co.*, 10 Exch. 45; s. c. 26 Eng. L. & Eq. 432.

⁴ *Ante*, Ch. XX.

⁵ *North American Ins. Co. v. Burroughs*, 69 Penn. St. 43.

Company,¹ a stipulation that particulars of the accident should be furnished within a specified time, was a condition precedent to the recovery, and a non-compliance therewith was not excused by the intervention of a death so sudden that the condition could not be complied with.² Notice of the death, required "as soon thereafter as possible," must be within a reasonable time; and what is a reasonable time is for the jury, if any facts from which the reasonableness of the time is to be inferred are in dispute, otherwise for the court.³

§ 537. **Accident — Form and Completion of Contract.** — From their very nature such contracts are made with the ordinary despatch of a purchase and sale. A passenger about to take the cars buys his ticket of insurance as he buys his ticket for fare, and oftentimes of the same person. In each case the ticket is evidence of a contract completed and binding on both parties. And as in other cases a parol contract to insure or to issue a policy is enforceable, the former at law, and the latter in equity, so here a promise to make out a policy, or to forward the requisite ticket, may be enforced by the appropriate remedy, — as where a party on his way to the cars meets the agent of the company, pays for an insurance for one day, and without waiting for his policy or ticket, which the agent promises to send him, proceeds to the cars and thence on his journey without having received either. The contract is nevertheless complete and valid.⁴

§ 538. **Accidents to Carriages.** — In France there has been for many years an insurance company, L'Automedon, which takes risks on carriages, indemnifying their owners against civil liability and loss by reason of the negligence of their drivers. In *L'Automedon v. Isot*,⁵ it appeared that one of the defendant's drivers had wilfully driven against and upset another carriage, whereby the owner was thrown out and injured. The injured party sued the defendant and recovered damages, for the reimbursement of which Isot, the defendant, brought

¹ Irish Rep. 4 C. L. 204.

² But see *ante*, § 465.

³ *Prov. Life Ins. and Inv. Co. v. Baum*, 29 Ind. 236. And see also *ante*, § 462, and *post*, § 539.

⁴ *Rhodes v. Railway Passengers' Ass. Co.*, 5 Lansing (N. Y.), 71.

⁵ *Dalloz, Jur. du Royaume*, 1844, pt. 2, p. 128.

suit against the insurers. The main ground of defence was, that as it would be against public policy to insure against the consequences of an act which amounts to a crime, such an accident could not be considered as within the scope of the policy; and such was the view taken by the departmental court; but on appeal to the Court of Cassation it was held that such accidents, whether *delicta* or *quasi delicta*, were properly subjects-matter of insurance. The temptation to perpetrate a public wrong, said the court, is counteracted by the fact that nothing can be recovered by the insured beyond the damages which he is compelled to pay.

§ 539. **Accident — Notice of Injury.** — Where the policy stipulates that immediately upon the happening of the accident, which may result in death, a surgeon shall be called, and notice of the accident shall be given within a limited time, a failure to do either will not affect the right to recover, unless it amounts to negligence; as where a laborer receives a fall, the serious nature of the consequences of which is not at first revealed, and which is of such an apparently trivial character as not at first to interrupt his work.¹

¹ *Déchéance et aut. c. Comp. d'ass. La Sécurité Générale*, Dalloz, Jur. du Royaume, 1870, pt. 3, p. 63.

NOTE. — Since this chapter was printed, the case of *Champlin v. Travellers' Passenger Ins. Co.*, 6 Lansing (N. Y.), 71, has come to hand, in which it is expressly decided that the doctrine of contributory negligence on the part of the plaintiff does not apply as a defence in actions on policies of insurance. In the same case, it appearing that the insured attempted to jump on to an omnibus — a public conveyance used for carrying passengers — while it was in motion, that he succeeded in getting on to the steps, which were at the rear of the omnibus, but was unable, by reason of the jar of the vehicle, to maintain his footing, and received injuries of a serious nature, from hitting his knee against the wheel, it was also held that the insured was travelling. "It would be a very strained construction," say the court, "of a contract like this to hold that he was not travelling. If he was not travelling, it is difficult to say what he was doing. We think that as he was actually going from one place to another, he was travelling."

CHAPTER XXIV.

OF GUARANTEE AND OTHER KINDRED INSURANCES.

§ 540. **Guarantee Insurance.** — What is termed guarantee insurance, which seems to be merely a mode of compensated suretyship, has not, as a distinct business of incorporated companies, had much vogue in this country, although companies have been incorporated with a view to the acceptance of such risks. Nor, indeed, in England, where efforts have been made to establish it as a branch of insurance business, has it made much progress. And there it has been made applicable, for the most part, to the indemnification of parties against the risk from wilful and culpable negligence, infidelity, fraud, and all forms of dishonesty. Strictly speaking, the term “guarantee insurance” is tautological, insurance itself having for its purpose, as we have seen,¹ to guaranty against all forms of loss or pecuniary injury. Of the principles which underlie the contract of suretyship generally we do not propose to speak.² But as special forms of suretyship have been undertaken, under the general title of insurance, we shall state such points in the history and development of these special forms as have come under the cognizance of the courts. The statements made in the application or proposal may be warranties or representations, as in other kinds of insurance, and, unless specially controlled by the terms of the contract, are subject to the same construction and have the like force and effect; though, in a mere contract of guaranty, the concealment or non-communication of material facts, unless fraudulent, is no defence to an

¹ *Ante*, § 2.

² The cases upon this subject seem to have been carefully collected by Bunyon, *Life Insurance*, p. 98 *et seq.*, and are reproduced in this country by Bliss, in the chapter on *Guarantee Insurance*, contained in his valuable work on *Life Insurance*, p. 722 *et seq.*, to which the reader interested in the matter is referred.

action upon the contract of guaranty.¹ And where the contract is substantially one of suretyship, the insurers will doubtless, after payment of loss, in accordance with the rule which obtains under the relation of suretyship, be subrogated to all the rights of the insured against the party in default, and entitled to all the securities which he may hold against him.² The form of the contract is a policy describing the subject-matter of the risk, setting forth the consideration, and pledging the funds of the company to pay in case the event insured against happens, subject to the conditions of the contract. It is in these special conditions that the policy differs from an ordinary bond of indemnity with sureties, given by a clerk, servant, or agent to secure his employers. These conditions refer, as in other kinds of insurance, to the various circumstances which attend the contract, as the payment of the premiums originally and in case of renewal, the truth of the statements in the proposal or application, the limitation of the risk assumed by the insurer, the notice of loss, mode of proof, times of payment, mode of adjustment, limitation of suit, &c., according to the special views and experiences of the insurers, and with such modifications as the peculiarity of the risk assumed demands. And the proposal contains such inquiries and answers as are calculated to enable the insurers to determine the value of the risk. As in marine and fire insurance the interest of the insured in the preservation of the property is secured by limiting the indemnification to a portion of the property lost, so in guarantee insurance the interest of the insured in preventing the occurrence of the event insured against is secured by providing that in case of loss only a percentage of the loss will be paid.³ And a not unusual provision, peculiar to this form of insurance, is the requirement that in case of loss the insurers shall be entitled to the services of the insured, in whatever form they may be made available, in bringing the delinquent to justice.

§ 541. The advantages of public or incorporated guarantee

¹ North Brit. Ins. Co. v. Lloyd, 10 Exch. 523.

² Montague v. Tidcombe, 2 Vt. 518.

³ Solvency Mut. Guar. Co. v. York, 3 H. & N. 588.

insurance over private suretyship are held out to be that it affords to the exertions of all classes increased facilities for obtaining occupations of responsibility and trust; that it encourages good character, by causing that alone to be the basis of suretyship, apart from the influence of family connections, private interest, or pecuniary resources; that it relieves private individuals from the necessity of becoming sureties, and from the consequent liability to which they or their estates may be exposed; and that it offers the best security to employers, because free from the uncertainty and anxiety which unavoidably attach to private suretyship, by reason of unknown death, insolvency, and the many casualties to which such sureties are liable. The union of guarantee with life insurance has also been attempted, upon the principle that two risks rendered dependent on each other can be insured at a lower rate than the same two risks separately. The life insurance becomes, as it were, a contingent collateral security against the risk undertaken for the guarantee, inasmuch as, if a claim be substantiated by the employer under the guarantee policy, the life policy is forfeited. While such a system appears to be equitable, it is also effective in the protection of employers, since the self-interest of the employed is involved in any act of delinquency. It is understood that the public authorities in England have to a considerable extent resorted to this form of guaranty in lieu of private bondsmen.¹

§ 542. *Guarantee Insurance — Warranty.* — In *Benham v. United Guarantee and Life Insurance Company*,² the defendants granted to the plaintiff, the treasurer of a literary institution, a policy of guarantee against loss occasioned by the want of “integrity, honesty, or fidelity” of the secretary of such institution, “arising out of his employment as such secretary.” The policy set forth that, as the basis for the contract of such guarantee, the plaintiff had lodged at the office of the defendants a certain statement containing a declaration, signed by the plaintiff, of the truth of the answers thereby given to the questions therein contained. This statement contained, amongst others, the following questions and answers:

¹ Bunyon, *Life Insurance*, p. 119.

² 7 Exch. 744.

“First, Is the applicant at present in your employment, and if so, in what capacity, and has he hitherto performed the duties of the situation faithfully and to your satisfaction? — He is secretary. . . . Secondly, Is the applicant personally known to you, or any of your firm, or by whom has he been introduced or recommended to you? — Only as above. Thirdly, In what capacity do you intend to employ the applicant? and with reference to this question state, as far as circumstances will permit: (a) The nature of his intended duties and responsibilities. — He is secretary of the Marylebone Literary Institution, of which I am treasurer. (b) The checks which will be used to secure accuracy in his accounts, and when and how often they will be balanced and closed. — Examined by finance committee every fortnight. (c) The salary or emolument, and when it will be paid to him, and how. — £30 a year at present.” Upon these facts, it was held that the statement that the accounts would be examined by the finance committee every fortnight did not amount to a warranty, but was a mere representation of the intention of the plaintiff; and that the insured might therefore recover for a loss arising from a want of integrity of the secretary, although such loss was occasioned by neglect to examine the accounts in the manner stated. The application in this case was by the secretary, and the questions proposed were to his employer. The proposal contained a declaration of the truth of the statement therein contained, and that it constituted the basis of the contract. All of the judges agreed that the answer as to the examination of accounts was nothing more than a declaration of the course intended to be pursued, and, if *bona fide*, was not otherwise to be objected to. Martin, B., also adverted to the fact that the questions were put to the employer as of some significance.

§ 543. **Guarantee Insurance — Misrepresentation.** — The National Guardian Life Insurance Society, as a branch of their business, issued policies called guarantee policies, having for their object the insurance of employers against loss by reason of the want of honesty or fidelity, or on account of the wilful or culpable default or negligence of their employés. Upon

one of these policies, insuring the honesty of a collector of taxes, defence was made on the ground of misrepresentation ; and it appeared that prior to issuing the policy certain questions were put to the insured and to his employers, and amongst others inquiry was made as to the largest amount of money which would come into his hands at any one time and be retained by him, and what checks were used to secure accuracy in his accounts. It was replied that he was to collect and account for the sums collected by him ; that the amount of money which he was to receive and retain in his hands, not longer than a week, was from one hundred to two hundred pounds sterling ; that his accounts would be checked weekly by the surveyor of taxes ; that the balance each week would be paid over ; and that such balances would be occasionally tested by his employers. It also appeared that his annual collections amounted to nine thousand pounds sterling, and he arrived at his answer by dividing that sum by fifty-two, the number of weeks in the year, whereas in point of fact in some weeks nothing was collected, and in other weeks as high as one-quarter part of the whole sum of nine thousand pounds was collected. And it also appeared that this want of uniformity in the weekly collection was well known to the insured, who was familiar with the course of business. And this sum, in the ordinary course of business, came into his possession during the first week of his service. The insurance was for the benefit of, and payable in case of loss to, the employer, and the employé became a defaulter. Stuart, V. C.,¹ seems to have entirely disregarded the misrepresentation as to the largest amount of money to be had in hand at any one time, but to have given judgment for the plaintiff on the ground that the answer about the check had upon the employer was made by the overseer of taxes, a servant of the commissioners, to the latter of whom the inquiry was addressed, and as the insurers accepted this answer, it could not be fairly considered a warranty by the commissioners, but was rather the representation

¹ Towle v. National Guardian Life Ins. Co., 7 Jur. N. s. 618. In this report may be found the form of the policy, with the accompanying conditions, which this society adopted.

of a third person of what was intended. On appeal, however,¹ before Lords Justices Knight Bruce and Turner, while the latter seemed to agree with the Vice-Chancellor on the point upon which he made the case to turn, both the learned judges held the statement about the amount of money received a misrepresentation, and as by the terms of the policy it was made void by misrepresentation, gave judgment for the defendant.

§ 544. Insurance against Loss in Trade by Bankruptcy of Purchasers. — In *Solvency Mutual Guarantee Company v. Froane*,² the insurance was against loss on the gross annual returns of their business for two years, by the bankruptcy of purchasers of goods, and unless two months' notice, prior to the expiration of the original contract, be given by one of the parties of an intention not to renew, the contract was to be regarded as a renewed contract of the like nature and conditions. This was held to be an agreement for a single renewal, if there was no notice to the contrary; but beyond this single renewal the contract did not extend. And to the same effect was the case of the same company against York.³ And in *Towle v. National Guardian Insurance Company*,⁴ Sir G. J. Turner, L. J., was of the opinion that a policy had lapsed where the policy provided that it should be good for a year, "and for every subsequent year that the society shall agree to renew, and the insured to pay" a specified sum, and the society had given no notice nor taken any action whatever touching the subsequent year. In the case of the same company *v. Freeman*,⁵ the insurance was of a firm against loss in respect of their gross annual returns, subject to the following condition: "If a member of the company shall die, or if any member, guaranteed with respect to his gross or particular trade debts, shall cease to be such a trader, his guarantee or contract shall become void on such death, or (if such trader) on his retiring from such trade;" and it was held that the retirement of one of two partners in trade was an event by which the condition was violated,

¹ *Towle v. National Guardian Life Ins. Co.*, 7 Jur. N. s. 1109.

² 7 H. & N. 5.

³ 3 H. & N. 588.

⁴ 7 Jur. N. s. 1109.

⁵ 7 H. & N. 17.

and the guarantee became void. And here, as in other forms of insurance, if a party has taken out a policy which is not in accordance with the terms of the agreement, the court will reform the policy, upon a proper bill, so as to make it conform to the original agreement, but will not allow the nonconformity to be pleaded in bar to an action.¹

§ 545. **Insurance of the prompt Payment of a Promissory Note.** — In the Supreme Court of Maryland,² a case arose upon a policy of insurance upon a promissory note guaranteeing its prompt payment at maturity. By the statute, the insurance company was authorized to make insurances “against all loss or damage from any cause, hazard, or liability whatsoever on and relating to factories, &c., *choses in action*, and personal property of every description.” The form of this policy was an agreement under seal, in consideration of the premium paid and securities deposited, to guarantee to the bearer the payment of the amount of the note on the day it should fall due, on presentation of the policy at the office of the company. It was held, upon the peculiar facts of the case, that the policy was valid and was negotiable, and therefore available in the hands of a third person. It appears that the note was surrendered to the insurance company at the time the policy was taken out. The form of the contract was declared to be immaterial. The purpose of the obligors being to protect the holder of the notes against the hazard of loss, any form of words effecting that purpose the law will adopt and enforce.

§ 546. **Insurance against the Birth of Issue.** — Insurance against the birth of issue has also been practised to some extent in England. But it has not, so far as we are aware, been introduced into this country; and indeed in England but few companies have the authority to embark therein. “The risk,” says Bunyon,³ “may be either coupled or not with some contingency dependent upon the duration of human life, such as the attainment of a particular age by the issue. The more common case is that in which a tenant for life, under a settle-

¹ National Guardian Ins. Co. v. Freeman, 7 H. & N. 17. See *post*, p. 712.

² Ellicott v. United States Ins. Co., 8 Gill & Johns. (Md.) 166.

³ Life Insurance; 98.

ment, is entitled to the reversion in fee-simple, subject to an estate tail in " his own issue (if any) by the particular marriage, and is desirous of mortgaging the estate without burdening his life interest with the premiums on insurances of his life. . . . The chances of having issue, as depending upon age, health, and other circumstances of more or less importance, are the elements upon which the value of the risk is based.¹

§ 547. Insurance of Rents, Titles, against Theft, Hailstones, and upon the Lives of Cattle. — Other forms of guarantee insurance are, insurance of rents, which has for its object the prompt payment of rent to landlords or others interested in the profits outcoming from real estate, or to insure to them a regular income by undertaking the management of the property, — to the mortgagee his interest, and to the mortgagor his surplus rent; insurance of what are termed *holding* titles to real property, or interests thereon, in contradistinction to *marketable* titles, whereby the former are rendered salable, and property otherwise immovable for lack of a good legal title, becomes marketable; insurance against theft, which needs no explanation; insurance against the ravages of hailstones; cattle insurance, or insurance against the loss of cattle by disease; — all of which have been practised to some extent in England, and the last two especially to a very considerable extent on the continent, particularly in Germany, France, and Switzerland. But no adjudications by the courts of England, of contested points arising under these several forms, have yet, so far as we are aware, been published, though on the continent, especially in France, there has been considerable litigation. These are not, however, deemed of such present interest in this country as to warrant their introduction here. In this country the lives of horses are insured to some extent. In *Hartford Live Stock Insurance Company v. Mathews*, a question arose as to the truth of the representation that the horse, whose life was insured, was sound, and of a certain value, when in fact he was not sound, and was of much less value. The insurers had paid the loss, and successfully sued to recover back the money paid, as ob-

¹ See Bunyon, *ubi supra*, for some speculations and discussions bearing upon this point.

tained through deceit and false swearing as to value at the time of the loss.¹ In *American Horse Insurance Company v. Patterson*,² which was also an insurance upon the life of a horse, the only question in dispute was whether the horse was alive when the policy took effect.

¹ *Ante*, § 477.

² *Ante*, § 44.

NOTE.— There was also an incorporated company under the name of the *Ætna Live Stock Fire and Tornado Insurance Company*. But we believe it was not successful, and has ceased to be.

CHAPTER XXV.

OF MUTUAL INSURANCE.

§ 548. **Mutuality — Membership — Capital.** — We have already had occasion to refer to some of the distinctions between mutual and stock insurance, especially with reference to their respective powers to enter into contracts, and to waive the provisions of their charters and by-laws.¹ Some further peculiarities of mutual insurance will be made the subject of this chapter. The principle which lies at the foundation of mutual insurance, and gives it its name, is mutuality, — in other words, the intervention of each person insured in the management of the affairs of the company, and the participation of each member in the profits and losses of the business, in proportion to his interest. Each person insured becomes a member of the body corporate, clothed with the rights and subject to the liabilities of a stockholder. He is at once insurer and insured. In New York, companies have been chartered to do business “on the mutual plan,” with authority to give the insured an option whether to pay the whole premium in advance in cash, without further liability to assessments, or to pay part in cash and part in an assessable premium note. And it was contended that this option was inconsistent with the principles of mutuality. But the courts held otherwise. The money they held to be in lieu of the note, and subject to the same appropriation, with the difference that it must be first applied, and no part of it can be withdrawn at the expiration of the policy, although it may not have been all expended. The principle of mutuality was said to consist not in the fact that each member is an insurer as well as the insured, but in the fact that he contributes to the common fund, — this contribution being sufficient to constitute membership, and may as well be represented by

¹ See *ante*, §§ 62, 146 *et seq.*

cash as by a note.¹ The fact that there is no further liability on the part of the member, if the possible extent of his liability is met by payment of cash in advance, does not militate against the principle of mutuality.² And the premium notes so held are liable for losses under cash policies.³

§ 549. **Mutual Insurance — Capital.** — Although the members of a mutual company are not usually denominated stockholders, and are not stockholders in the usual sense of the word, yet they are in point of fact stockholders, and in many of the policies are recited to have taken a portion of the capital stock. This stock is usually taken by paying in a certain amount of cash premium, and the balance in what are denominated premium notes; that is, notes given for premiums, to form the basis of assessments for losses and expenses, and constituting the capital or funds of the company. The capital stock of a mutual insurance company usually consists in its cash assets, its premium and deposit notes, assessable to pay losses, which are usually denominated absolute funds, and the liability to a fixed amount, by statute or charter, over and beyond these, to be resorted to after the first are exhausted, and usually denominated conditional funds. Sometimes notes given to the company in advance for premiums, called stock notes, and expressly made payable by insurance from time to time, as the makers of the note may require, constitute a portion of the capital stock. And between these latter notes and the ordinary deposit notes, made payable from time to time, as called for by assessments for losses, the distinction is to be observed that whereas the former are payable absolutely and at all events, without regard to the question of loss,⁴ and are therefore subject to the Statute of Limitations,⁵ and are negotiable,⁶ the latter are only payable at

¹ *Mygatt v. N. Y. Prot. Ins. Co.*, 21 N. Y. 52; *Ohio Mutual Ins. Co. v. Marietta Woollen Factory*, 3 Ohio St. n. s. 348.

² *Union Ins. Co. v. Hoge*, 21 How. (U. S.) 35. The three cases last cited, and especially the first of them, are referred to as containing a very elaborate discussion of the principle which underlies mutual insurance. But see *contra*, *Hart v. Achilles*, 28 Barb. (N. Y.) 577.

³ *White v. Havens*, 20 How. Pr. Rep. 177.

⁴ *Dana v. Munro*, 38 Barb. (N. Y.) 528.

⁵ *Savage v. Medbury*, 19 N. Y. 32.

⁶ *Buckman v. Metcalf*, 32 N. Y. 591.

such times and in such portions as may be necessary to meet losses and expenses, are not negotiable, because payable only upon a contingency which may never happen, and the general Statute of Limitations does not run in favor of the note as a whole, but only upon so much as may be called for, and from the time of the call.¹ And a premium note, absolute on its face, cannot be treated by the company or its receiver, or by any one except a *bona fide* holder, as a stock or capital note, so that the whole may be collected without regard to losses or assessments.² A note given in advance for premiums to be earned, and by the terms of the charter not to be held liable for any amount beyond the premiums earned, is a premium note, and not a subscription or capital stock note, and is collectible only so far as premiums have been earned.³ And a note, in form a premium note, may be shown to have been given as a subscription or stock note, and used as such, with the consent of the maker, in organizing the company; in which case the whole amount may be collected without assessment.⁴

§ 550. **Mutual and Stock Companies.** — In some instances the stock and mutual plans of insurance are authorized by the charter, and practised by the same insurance company. When this is the case, the insured, in the absence of any statement in the contract in which category he is included, will be deemed to be insured under the stock or mutual plan, according to the circumstances and nature of the particular contract.⁵

§ 551. **Mutual Life Insurance — Guaranty Fund.** — Under its inherent powers, as incidental to its general power to issue policies of insurance, a mutual life insurance company may, by an agreement amongst its members, establish a guaranty fund, consisting of the notes of the several members, upon which they may receive a commission of a percentage per annum, so long as the notes are held as a part of such fund. And in case

¹ *Savage v. Medbury*, *ut supra*; *Howland v. Edmunds*, 24 N. Y. 307, reversing *Bell v. Yates*, 33 Barb. (N. Y.) 628, *contra*; *Hope Ins. Co. v. Weed*, 28 Conn. 51; *Howland v. Cuykendell*, 40 Barb. (N. Y.) 320.

² *Bell v. Shilley*, 33 Barb. (N. Y.) 610; *McIntire v. Preston*, 5 Gilm. (Ill.) 48.

³ *Elwell v. Cruker*, 4 Bosw. (N. Y. Superior Ct.) 22.

⁴ *Sands v. St. John*, 36 Barb. (N. Y.) 628.

⁵ *Illinois Fire Ins. Co. v. Stanton*, 57 Ill. 354.

of insolvency of the company, these notes may be assessed to pay losses to their full amount, the makers standing in the position of general creditors as to their claims for commission against the company.¹ If such a right be given by charter, the notes of persons not members cannot be substituted under this chartered privilege.²

§ 552. **Mutual Insurance — Membership.** — When a party takes out a policy, and the contract is complete, he becomes a member, and is bound by its rules, which he is presumed to know.³ The records of the company are then his records, and evidence for or against him; ⁴ and the doings of the officers, within the scope of their authority, are binding upon him.⁵ But he is not a member till the negotiations are complete, and is not presumed to know any thing of the rules and by-laws pending the negotiations.⁶ After he becomes a member he cannot deny its existence, or avail himself of an irregularity in the proceedings by which it became a corporation or acquired its powers; ⁷ nor can he deny the acceptance of an amendment to the charter, after he has given a note in accordance with the provisions of such amendment; ⁸ nor can he set up a want of insurable interest as a defence against assessments.⁹ He is not, however, bound by a by-law or other act of the company affecting his contract or relation to the company, passed without his consent,¹⁰ especially if in contravention of the charter.¹¹

¹ Hope Mut. Life Ins. Co. v. Weed, 28 Conn. 51; Same v. Perkins, 38 N. Y. 404, affirming s. c. 4 Robt. 18.

² Mut. Ben. Life Ins. Co. v. Davis, 12 N. Y. (2 Ker.) 569.

³ Mitchell v. Lycoming Mut. Ins. Co., 51 Penn. St. 402; Coles v. Iowa State Mut. Ins. Co., 18 Iowa, 426.

⁴ Diehl v. Adams County Mut. Ins. Co., 58 Penn. St. 443.

⁵ Hackney v. Alleghany County Mut. Ins. Co., 4 Penn. St. 185.

⁶ Columbia Ins. Co. v. Cooper, 50 Penn. St. 331.

⁷ Sands v. Hill, 42 Barb. (N. Y.) 65; Traders' Mut. Fire Ins. Co. v. Stone, 9 Allen (Mass.), 483; Appleton Mut. Ins. Co. v. Jessor, 5 ib. 446; Citizens' Mut. Ins. Co. v. Sortwell, 8 ib. 217; Currie v. Mut. Ass. Soc., 4 H. & M. (Va.) 315; Cooper v. Shaver, 41 Barb. (N. Y.) 151.

⁸ Fell v. McHenry, 42 Penn. St. 41.

⁹ New England Mut. Fire Ins. Co. v. Belknap, 9 Cush. (Mass.) 140.

¹⁰ New England Mut. Fire Ins. Co. v. Butler, 34 Me. 351; Hamilton Mut. Ins. Co. v. Hobart, 2 Gray (Mass.), 543; Insurance Co. v. Connor, 17 Penn. St. 136.

¹¹ Great Falls Mut. Fire Ins. Co. v. Harvey, 45 N. H. 292.

§ 553. **Forfeiture of Policy no Defence against Liability on Note.**—When membership is once established, its liabilities continue, although the member does some act which, by the terms of the contract, avoids the policy, and although the company declares the policy void, so that the right of the insured to indemnity in case of loss no longer exists. And this liability extends to all losses while the policy was in force and the insured was a member.¹

Acts of policy-holders, which might entitle the corporation to defend against claims for losses, do not necessarily release such parties from liability to assessment as members. They cannot take advantage of want of insurable interest, whether it existed originally, or was occasioned by destruction or removal of the buildings insured, or by alienation; nor of misdescription of the property insured, or its mode of occupation; nor of a loss of the right to recover upon the policy by reason of other insurance not assented to. Such parties are members of the corporation, notwithstanding such ground of defence to a suit for recovery of a loss.

But members only are liable to assessment. Parties who have neither taken their policy, nor signed any application or deposit note, nor paid the premium, are not members, and cannot properly be included in the assessment. Assignees of policies, even with consent of the company, who have not made themselves members by signing any agreement to become so, or to pay what may become due upon the policy or upon the deposit note, are not liable to assessment.²

And if the policy by its terms stipulates that in case of forfeiture by the act of the insured he shall not be released from the obligations of the deposit or premium note until he has complied with the conditions of the policy and charter requiring the payment of his proportion of all losses and expenses that may have accrued prior to the surrender of the policy or

¹ *Iowa State Mut. Ins. Co. v. Prosser*, 11 Iowa, 115; *Commonwealth v. Union Mut. Fire Ins. Co.*, Sup. Jud. Ct. Mass., March, 1873, not yet reported.

² *Commonwealth v. Union Mut. Ins. Co.*, *ubi supra*; *Philbrook v. New England Mut. Ins. Co.*, 37 Me. 137; *Gardiner v. Piscataquis Mut. Fire Ins. Co.*, 38 Me. 439; *Boynton v. Clinton Ins. Co.*, 16 Barb. (N. Y.) 254.

alienation of the property, the insured will still remain liable upon his deposit note for losses occurring after, as well as before the alienation or act working the forfeiture, until all assessments are paid and the policy surrendered. And this is so notwithstanding the policy provides that the person becoming a member shall continue a member so long as he is insured and no longer.¹ But an assessment, after forfeiture of the policy, made with knowledge thereof, and for losses occurring afterwards, is a waiver of the forfeiture, and gives to the insured the right to indemnity for loss under the policy.² It is otherwise, however, if the assessment is made for a loss occurring before the forfeiture,³ or be made without knowledge of the forfeiture.⁴ And an assessment for losses occurring after forfeiture, made by the company with knowledge of the forfeiture, cannot be enforced.⁵

§ 554. **Forfeiture — Premium Note.** — A successful defence to an action on the policy for a loss, on the ground that the policy became void because the insured procured other insurance without notice, is in legal effect an adjudication between the parties that the policy was void from and after the day when the additional insurance was procured; and from the moment that the insurers thus elect to avoid the policy, the premium note also becomes void and without consideration in respect to all future losses.⁶ A vote, however, to suspend the operation of the policy, without authority of charter or by-law, or the assent of the insured, is of no force or effect.⁷ In Rhode Island, where a mortgagor insured under a policy, void if the interest of the

¹ *Hyatt v. Wait*, 37 Barb. (N. Y.) 29; *Neely v. Onondaga County Mut. Ins. Co.*, 7 Hill (N. Y.), 49; *Atlantic Ins. Co. v. Goodall*, 35 N.H. 328. But see *contra*, *Wilson v. Trumbull County Mut. Ins. Co.*, 19 Penn. St. 372.

² *Sands v. Hill*, 42 Barb. (N. Y.) 651; *Insurance Co. v. Stockbower*, 26 Penn. St. 199; *Tuttle v. Robinson*, 33 N. H. 104. But see *contra*, *Philbrook v. New England Mut. Ins. Co.*, 37 Me. 137.

³ *Viale v. Genessee Mut. Fire Ins. Co.*, 19 Barb. (N. Y.) 440.

⁴ *Allen v. Vermont Mut. Fire Ins. Co.*, 12 Vt. 366; *Finley v. Lycoming County Mut. Ins. Co.*, 30 Penn. St. 311.

⁵ *Tuckerman v. Bigler*, 46 Barb. (N. Y.) 375; *Smith v. Saratoga County Mut. Ins. Co.*, 3 Hill (N. Y.), 500; *Wilson v. Trumbull County Mut. Fire Ins. Co.*, 19 Penn. St. 372.

⁶ *Tuckerman v. Bigler*, 46 Barb. (N. Y.) 375.

⁷ *New England Mut. Fire Ins. Co. v. Butler*, 34 Me. 451.

insured should be conveyed without the consent of the insurers, made an assignment of his interest without the knowledge of the insurers or the mortgagee, and afterwards, but without knowledge of the alienation, the insurers made an assessment and collected it from the insured, in an action to recover the loss, with a count for money had and received, it was held that though the plaintiff could not recover for the loss by reason of the alienation, and although the collection of an assessment without knowledge of the forfeiture was no waiver, yet the insured might recover back on his money count what he had paid on the assessment, as money paid by mistake.¹

§ 555. **Void Policy — Surrender and Cancellation — Insolvency.** — If the contract of insurance be invalid, as prohibited unless under certain preliminary conditions precedent, the premium note is also invalid *ab initio*.² So if the policy was delivered but was ineffectual, because never countersigned, the premium note is also invalid.³ And it has been held that the surrender and cancellation of the policy and premium note dissolves the membership, carries with it the note, and releases the insured from further claims, whether on account of past or future losses, as amounting to an adjustment of mutual claims.⁴ So the insolvency of the maker of the premium note, and his discharge from his debts, relieves the company from any obligation towards him, and the receipt of interest upon the premium note after the filing of the peti-

¹ Hazard v. Franklin Fire Ins Co., 7 R. I. 429. In Indiana, it is said, *obiter*, that where a policy becomes void by a sale and conveyance by the insured, he is no longer liable to an assessment upon his premium note : Boland v. Whitman, 33 Ind. 64 ; though in a previous case, Indiana Mut. Ins. Co. v. Connor, 5 Ind. 170, the note was held to be collectible in proportion to the time the policy was in force. And the liability is discharged whether the policy be actually surrendered or not, the insured having paid all assessments and dues up to the time of forfeiture. The insurance is the consideration upon which the note rests, and that failing, the note fails : Ibid. ; overruling McCullough v. Indiana Mut. Fire Ins. Co., 8 Blatchf. (Ind.) 50, and Indiana Mut. Fire Ins. Co. v. Coquillard, 2 Ind. 645, holding that an actual surrender of the policy is necessary.

² Haverhill Ins. Co. v. Prescott, 42 N. H. 547.

³ Lynn v. Burgoyne, 13 B. Mon. (Ky.) 400.

⁴ Wadsworth v. Davis, 13 Ohio St. 123 ; Hyde v. Lynde, 4 Comst. (N. Y.) 387 ; Campbell v. Adams, 38 Barb. (N. Y.) 132 ; York County Mut. Fire Ins. Co. v. Turner, 53 Me. 225.

tion in bankruptcy, without *actual* knowledge, will not revive the policy.¹ Other authorities hold that in such cases the policy is merely voidable and not void, and the premium note is therefore valid, at least till the insurers assert their right to claim a forfeiture.² But it is elsewhere held that neither the surrender and cancellation, nor the expiration of the policy, nor the insolvency of the company, releases the holder of a policy from his liability to assessment for losses which occur during his membership.³ The true doctrine doubtless is, that if the surrender of the policy and of the premium note are in pursuance of an adjustment which the company has a right to make, there is no longer membership or liability. An unexecuted agreement to cancel is no defence.⁴ Neither does the destruction of the property and payment of the loss dissolve the relations of the insured to the company. He is still insured and liable on his deposit note during the currency of the policy; and during that period the company has a lien upon the insured premises.⁵ Upon a vote of the directors, authorized by the by-laws, that by reason of non-payment of an assessment the policy shall be suspended till payment, the liability of the insured to assessments for losses occurring during the suspension continues, though his right to indemnity meantime is in abeyance.⁶ So, without a vote of the directors, if the charter provides that neglect to pay an assessment shall operate as a suspension of the liability.⁷

¹ Reynolds v. Mut. Fire Ins. Co., 34 Md. 280. It was said by Bradley, C. J., in Frost v. Saratoga Mut. Fire Ins. Co., 5 Denio, 154, that if the policy is void for false warranty, the premium note is void for want of consideration. But this was not a point necessary to be decided in the case.

² Huntley v. Perry, 38 Barb. (N. Y.) 571; Atlantic Ins. Co. v. Goodall, 35 N. H. 328. But see *contra*, Gardiner v. Piscataquis Mut. Fire Ins. Co., 38 Me. 439; Jackson v. Mass. Mut. Fire Ins. Co., 23 Pick. (Mass.) 418; Wilson v. Trumbull County Mut. Fire Ins. Co., 19 Penn. St. 372.

³ Commonwealth v. Union Mut. Fire Ins. Co., Sup. Jud. Ct. Mass., March, 1873, not yet reported; Same v. Mechanics' Mut. Fire Ins. Co., *ibid.*; St. Louis Mut. Fire Ins. Co. v. Broeckler, 19 Mo. 135; Sterling v. Mer. Mut. Ins. Co., 32 Penn. St. 75; Alliance Mut. Ins. Co. v. Swift, 10 Cush. (Mass.) 433.

⁴ Columbia Ins. Co. v. Stone, 3 Allen (Mass.), 385.

⁵ Bangs v. Skidmore, 24 Barb. (N. Y.) 29; affirmed, 21 N. Y. 136; New Hampshire Mut. Fire Ins. Co. v. Rand, 4 Fost. (N. H.) 428.

⁶ Coles v. Iowa State Mut. Ins. Co., 18 Iowa, 425.

⁷ Nash v. Union Mut. Ins. Co., 43 Me. 343.

§ 556. **Life Insurance — Premium Note — Liability after Lapse of Policy.**—The charter of a life insurance company provided that all who insured with the company should be deemed members while they continued so insured; also, that the company might take the notes of the members, either in whole or part payment of premium; also, that if losses were sustained by the company in excess of the funds on hand, the directors might assess the deficiency ratably upon such members, the assessment not to exceed the sum due on the notes, of which sixty days notice was to be given; and if the amount assessed was not paid within that time, the party in default was to cease to be a member of the company, and forfeit all preceding payments. It was also provided that if the premium in any case should exceed fifty dollars, one-fourth of the amount should be paid in cash, and the balance might be paid by a secured note subject to assessment.

J. effected insurance with the company, paid one-quarter of the first year's premium in cash, and gave his note for the balance. At the expiration of the first year he paid one-quarter in cash towards the second year's premium, and gave his note for three-quarters of the total premium for the first and second years, and took up his former note. The insured, at the end of the second year, gave up his policy, withdrew from the company, and ceased to be a member thereof. In an action on the last note, after the policy had lapsed, it was held that, in the absence of proof of any assessments to make up deficiencies as provided in the charter, the company was not entitled to recover, the note being regarded as a mere security for the payment of losses, upon assessments made for that purpose.¹

¹ Mut. Ben. Life Ins. Co. v. Jarvis, 22 Conn. 133. There was a dissenting opinion by Ellsworth, J. The whole case is so instructive that we give it more fully in this note. The action was upon the following promissory note and guaranty:—

“MIDDLETOWN, October 7, 1848.

“\$367 $\frac{50}{100}$.

“I promise to pay the Mutual Benefit Life Insurance Company, or to the order of their treasurer, three hundred and sixty-seven $\frac{50}{100}$ dollars, for value received, without defalcation or discount, with interest, at six per cent, payable

§ 557. Right to assess strictly construed. — An assessment can only be valid when laid under the conditions stated in the

in twelve months after date, or sooner, if required to meet assessments by the company.

“GEO. O. JARVIS.”

“For value received, I guarantee the payment of the above note, and stand security therefor till paid.

“WILLIAM JARVIS.”

“MIDDLETOWN, October 7, 1848.

“Received on the within note, as principal, twenty-seven $\frac{56}{100}$ dollars. November 29, 1848.”

Hinman, J., for the majority of the court: “The plaintiff’s charter makes them in fact, as well as in name, a mutual benefit life insurance company. This is the fundamental principle of their organization. It is implied in their name and is more fully expressed in the body of the charter, which gives them power to insure the respective lives of their members, and denies them the power to insure any others, by providing that all persons who shall at any time insure in or with said association, shall, while they continue so insured, be deemed and taken as members of the corporation; and provides for an equal assessment upon all the members, in proportion to each member’s insurance, to pay for losses which the company may not have funds on hand to discharge.

“The sixth section of the charter authorizes the company to take the notes or obligations of their members for the amount, either in part or in whole, of the premiums of insurance, in proportion to the amount insured; and then in the ninth section it is provided, that if it shall so happen that there shall be just claims on the corporation for losses sustained, to a greater amount than they have funds on hand to discharge, the directors in such case shall proceed to assess such deficiency, in a ratable proportion, on the members of the association, or their lawful representatives, according to the amount of each member’s insurance, *‘provided that such assessment shall not exceed the amount of the note or obligation given by each member.’* The section further provides, that if, on due notice of his assessment, a member shall neglect to pay the same within sixty days, he shall forfeit all claim to his policy, shall be no longer a member of the association, and shall also be liable to the amount of such assessment in an action of debt. The only provision in the charter relative to the payment of losses is contained in this ninth section; and as the funds of the company are all derived from the payment of premiums by the members, on their respective policies, and as the members are in no event liable to be assessed to any greater amount than their respective notes or obligations, it is clear that the notes or obligations referred to in the ninth section of the charter as liable to this assessment must be the notes or obligations which the company are authorized to take of its members for the amount, either in part or in whole, of their respective premiums of insurance; or, as they are called in the rules and regulations of the company, they are the *premium* notes of the members. The finding shows that the note in suit was one of these premium notes; and as the company has met with no losses which make it necessary for them to collect it, and has made no assessment to meet any loss, the question arises whether the defendant is liable upon

charter. A general vote of the directors to assess to a certain amount to pay the indebtedness of the company is no valid

his note, except for the purpose of meeting a loss, and then only to the extent of an assessment regularly made according to the provisions of the ninth section of the plaintiff's charter. The note is absolute and unconditional in its terms, and as the time it had to run has expired, it appears to be due. If this was all there was in the case, undoubtedly the plaintiffs could recover. It might have been given for money, or it might have been given for the premium, or the portion of it that was, by the agreement of the parties, to be paid in cash, irrespective of any call for losses; and if such was the case it ought to be paid. The finding, however, shows that such is not the case, and, on the contrary, that the understanding upon which this note was given was, that it was not to be paid unless required to meet losses. It was given for a portion of the premium which, by the regulations of the company, it was the intention should be met by the profits of the business, unless required to meet losses. In the prospectus containing the rules and regulations of the company, which was examined by the defendant for the purpose of determining whether he would become a member of the company, and was delivered to him for that purpose by the company's agent, we find one of the first regulations to be that the premium, if over fifty dollars, can be paid, one-fourth in cash and three-fourths in a secured note at twelve months, bearing six per cent interest, and subject to assessment, if required; or it may be paid weekly, monthly, or quarterly. It was under this regulation that the note in suit was given. It was in part a renewal of an original note given for seventy-five per cent of a previous year's premium, and in part for the same percentage on the then accruing year's premium. Under the head of 'mode of payments,' we find this rule repeated in these words: 'If the annual premium is over fifty dollars, he can pay one-fourth in cash and three-fourths in a secured note at twelve months, bearing interest at six per cent, which note is subject to assessment, if required by the directors, and of which sixty days' notice will be given. At the end of the year, if the party so desires, he may renew the balance of the old note not then called for, by paying the interest and adding it to the next year's premium note, and paying his twenty-five per cent in cash as at first.' Again, the company anticipated that the members would receive back a large percentage of the amount paid, in annual dividends of profits, to be declared upon the amount of premium; and in order to equalize the benefits to all their members, they provide that *scrip*, bearing six per cent interest, shall be issued to those who pay their premiums in full, which interest is to be paid annually; while those who give and renew their notes are not to receive scrip, but their proportion of profits is carried to their credit, and draws interest, being retained by the company as additional security for the notes. Again, the company say that by the system of payments adopted by them, it is easy for all who are not paupers to protect their families from want; they are not required to pay from year to year in cash a portion of the premium, which is to remain in the hands of the company as profits, but the profits, after a few years, can be used by them to aid in the payment of their annual premium. It is not necessary to allude further to the charter, and the rules and regulations of the plaintiffs' company. Undoubtedly there are other parts of these documents which have a bearing upon the question under consideration. Indeed, the

assessment. It must appear that such a state of affairs existed when the vote was passed as to authorize the vote itself,

whole tenor of them, in connection with the circumstances under which the note in question was executed, goes to show that the only object of the note was to secure the company against losses which might be sustained while the insured remained a member of the association. The charter authorizes the company to take premium notes. It provides how the losses of the company shall be assessed upon these notes. These two provisions are followed up in the regulations of the company, which provide that the parties may renew at the end of the year the balance of the old notes not called for or required by the directors. If it be asked what power the directors had to call for assessments, the answer is in the charter, 'to meet losses.' Indeed, in the argument of the case, counsel seemed to admit that in regard to all who continued members of the company, and chose to renew their notes from year to year, they had a right to do so. It was the expectation of the company that the twenty-five per cent of the premium, which was required to be paid in cash, would be sufficient to meet the ordinary expenses and pay the ordinary losses; and the seventy-five per cent would never be required to be paid, except perhaps a small balance which might be due at the death of the insured, after deducting the proportion of profits that might be earned by the company, and the balance was then only to be deducted from the amount of the policy. In this way those who paid their premiums in full, by receiving dividends of profits annually, would, in the end, be made equal with those who only paid twenty-five per cent of their premiums in cash; and the company prominently held this out as an inducement to persons of limited means to insure their lives in this association; and it is this principle alone which enables them to say in their prospectus that it is easy for all who are not paupers to protect their families from want, by insuring their lives with them; and this makes between all the members that mutuality in regard to profits and losses which was contemplated by the charter and the organization of the company. But if the company can collect just such notes as it pleases, without first making an equal assessment upon all, it is clear that there is an end to any thing like mutuality. It is not pretended that they do collect the great mass of their premium notes; but the broad ground is taken that they can collect, or omit to collect any or all, as the company pleases, thus destroying all mutuality, and leaving the members who have taken their policies upon the faith that they could renew their notes from time to time, unless required to meet losses to be assessed upon all alike, at the mercy of the persons who may be officers of the company for the time being. It is insisted, however, that the provisions of the ninth section of the plaintiff's charter relate only to the members of the association, and have no application to the defendant after he ceased to be a member. But the defendant was a member when he gave the note, and it was the act of giving it, and paying that portion of the premium which is required to be paid in cash, that continued to him his right as such member; and we look in vain to the charter or regulations for any different rule or distinction between the notes of the members and those who have ceased to be members. The premium notes all stand upon the same footing, and the character which the charter and the regulations of the association impressed upon them at their inception must remain, unless there is something in the same documents to alter it. The difficulty under which the plaintiffs

as that losses and expenses had actually been incurred beyond the available assets in hand, and which could not be

counsel labor arises from their looking at the absolute terms in which the note itself is expressed. But if we take it in connection with the charter, and consider that it was not an ordinary note, and was never delivered as such, but was delivered as a premium note, under the charter and the regulations of the company, we at once attach to it all the conditions which are expressed in the charter and regulations. By these conditions it appears that it was never an absolute promise to pay, but was a mere security for losses, and merely subject to assessments for losses, and for nothing else; as a conditional security for losses, there was a consideration for it, and to collect it for other purposes would operate as a fraud upon the maker. Again, it is said that the consideration of the note was the premium of insurance on the defendant's life for the year it had to run, and that the defendant had the benefit of the insurance for that year, and in justice ought to pay for the risk. If this was so in fact, we do not see that it would make him liable in any other way than is prescribed in the charter; but enough has been said to show that this is not so. By giving the note, he came under an obligation to pay such assessment for losses, not exceeding its amount, as might be regularly made by the directors: none such has been made, and so there is no obligation to pay; nor is this unjust in regard to the other members of the association. By looking at the tables in the prospectus, it will be seen that the real risk which the company ran, for the year previous to the time the note fell due, was but a trifle over the twenty-five per cent of the premium which was paid in cash. If he had insured for a single year, the premium would have been at the rate of about two per cent on a hundred dollars, whereas, by insuring for life, they charged him nearly five per cent annually. The additional charge undoubtedly arises from averaging the risk among all the years that such a life is estimated to last. Still it is no less true that he paid the company in cash very nearly the full value of the risk the company ran before his policy became void by his withdrawal; and it is this fact which enables the company safely to issue life policies upon the payment of so small a proportion of the premium in cash. If the members withdraw from the association, they have paid in cash the full, or about the full value of the risk which the company had run before the withdrawal; and if they do not withdraw when the policy is paid, the company deduct the balance of the premium notes not previously paid by a credit of profits from the sum insured in the policy. Upon this system, the company, if it has correctly calculated the proportion of the premium which it will require to be paid in cash, is always safe. Indeed, it is for its advantage, after the life policies have run a few years, that the members should avoid their policies by withdrawal, and obviously becomes more and more so by the lapse of time. Indeed, so obvious is this, that the regulations say that the assured can, after a term of years, surrender the policy and receive its equivalent in value; and this seems to us a sufficient answer to the suggestion that it was a fraud upon the company to take the benefit of the policy for the year before the withdrawal, and not pay the premium charged."

Ellsworth, J. dissented: "My reflections upon this case have brought me to a different conclusion from that expressed by my brethren. Mr. Jarvis, the defendant, applied to the plaintiffs for an insurance upon his life for \$5,000, from

met but by an assessment. The liability of a member of a mutual insurance company on his premium note, left as a

the 7th of October, 1847. From Carlisle's tables (which were used by the company to ascertain the proper annual premium to be paid by the defendant) it appears, and it was agreed, it should be the sum of \$245; one-quarter of this the defendant paid at the time, and gave his note for the remaining three-quarters, payable at the end of the year, 'without default or discount,' with interest. If, at the end of the year, he chose to continue a member of the company by further insuring, he could, at his request, renew the insurance for another year, by paying twenty-five per cent of the premium for another year, and giving a new note for the amount of the former note and interest and the three-quarters of another \$245, the premium for the second year; so that the note now in suit consists of premium and interest for two years' insurance. This premium note fell due on the 7th of October, 1849, that being the date up to which he had been insured, and after which he did not ask for further insurance. It will thus be seen that the company had insured the defendant's life for two years, at the stipulated premium; and how the defendant is to get rid of the payment of this *earned* money, by his own act simply, I have not been able to discover. The money, being earned, can be recovered on the common counts as well as on the special count.

"By the terms of the charter, in the sixth section the company declare 'that it shall and may be lawful for the officers of said corporation to take the notes or obligations of the members for the amount, either in part or in whole, of the premium of insurance, in proportion to the amount insured.' In pursuance of this provision, the directors passed a by-law, that, in all cases where the premium was over fifty dollars, the insured might pay twenty-five per cent down, and give his note for the balance, to be paid at the end of the year, with interest, this being the termination of the risk; and if possible to make this obligation more clear and strong, it was to be paid without defalcation or discount, and might in the mean time be called for, should the company need it to pay losses. It would seem, therefore, that the note in question was understandingly given as an equivalent for the risk taken by the plaintiffs for the defendant's life for the space of two years. So, from the note itself, it seems the promise is *absolute* and *positive*. The money is to be paid in twelve months after date, and *sooner*, if required to meet assessments.

"It is said, however, that the note is not absolute, and is not to be paid, as is written, without defalcation, but is to be paid only upon future assessments. Here, I think, is the great mistake of the defendant's counsel. The defendant, by separating himself from the company, has deprived himself of the privilege contemplated by this provision of the by-law, so that the by-law is not at all applicable to the case of the defendant. The provision is intended for his benefit while he remains a member; but he has forfeited that privilege by his separation. When he ceased to be a member, he ceased to be a subject of assessment, both by the charter and the by-laws; for *none but members can be assessed*. Were it indeed practicable to assess those who had been members, for what losses could this be done? those that accrued during membership, or those which may accrue at any future period, upon policies issued during the time of membership?

"It must be conceded that if the defendant is not liable in the present suit he

deposit as the basis of an assessment should occasion arise, is not an absolute liability to pay the whole amount of his

is not liable at all, and yet he has been insured for the agreed premium of \$490, by paying only \$122.50. In the same by-law, to which the defendant refers for his deliverance from this note, we find what I am confident is the only provision applicable to this case. It is this : 'At the end of the year, if the party so desire, he may renew the balance of the old note, not then called for, by paying the interest, adding the next year's premium, and paying twenty-five per cent in cash as at first.' This the defendant has not desired to do ; but, on the other hand, has absolutely refused and neglected to do any thing, and yet insists he ought not to pay. He claims that he cannot be assessed, because he is not a member, and that he cannot be compelled to pay without assessments. Thus he would avoid the payment of a note as fairly earned and due as any that was ever presented in a court of justice. I am for holding the defendant to his agreement. If he will not renew his note, nor pay the stipulated twenty-five per cent, nor find satisfactory security, he ought to pay the note *as it is written* ; upon his own showing, the assessment provision has nothing to do with the question. And further, the note, under no circumstances, is to be assessed. By the ninth section of the charter, in a ratable proportion the *members* of the association (not the notes of the members) may be assessed. The notes are held to be due and payable as written ; and, as I contend, are absolutely payable when and because the members have enjoyed their insurance, and cannot alter their obligations by withdrawing from the company.

"It must be further remembered that these notes, given for earned premiums, constitute the fund of the company to which the public look for the payment of losses, but they now discover that these notes mean nothing and secure nothing. The consequence, too, is that a person may remain a member of the company and be insured for any time, twenty or fifty years, until his premium note shall amount to thousands of dollars, and then retire from the company, repudiate his note, and, if dishonest enough, pursue the same course with another company.

"I would inquire, what is the difference between the person who pays in cash, when the annual premium is less than fifty dollars, and one who pays partly in cash and partly in a promissory note where the premium is more ? Upon the hypothesis of the defendant, the latter may pay one-quarter of his premium and be as fully insured as if he had paid the whole. This is a gross absurdity, and I cannot feel that it is at all in accordance with the understanding of the parties, or the public, or with any principles of justice or law with which I am acquainted. From the first breaking of this case I have been at a loss to learn what could be urged by the defendant in favor of this defence.

"Something has been said about the want of mutuality and of consideration ; but no question of this kind can arise ; for the defendant's life was insured for two years at the price agreed, and that surely is mutuality and consideration enough. And I insist that the defence is nothing but a barefaced attempt to avoid the payment of a clear note of hand. The defendant was fairly and fully insured ; and had he died within the two years, his representatives would have been entitled to the five thousand dollars. And yet he asserts that, though he was so insured, he will not fulfil the contract as he made it. He will neither

note, but it is conditional, and depends upon the contingency of the happening of losses and expenses to which he shall be liable to contribute, which have been duly ascertained by the directors, and which make necessary a resort to an assessment thereon. The promise of the insured is to pay upon such conditions; and the existence of these conditions must be established affirmatively before a call for the payment of the note, or any part thereof, can be enforced.¹ Though the premium note be absolute on its face, yet, being given to pay losses, it is only assessable in case of loss.² But the assessment must be made in strict accordance with the authority given. Thus, where the charter authorizes the directors to make an assessment, and they vote to assess to a certain amount, and thereupon refer the matter to a committee to make the assessment, who—a minority of the directors—assess a different and less sum, the assessment is invalid: so held in an action on a note to recover such an assessment.³ So a vote to make an assessment, leaving the per cent or amount in blank, is invalid.⁴ And so is a vote to assess passed by a board of directors illegally elected;⁵ though an assessment was held valid made by

renew nor pay his note, nor remain in a condition to be assessed; and in this defence he has succeeded, as I think, by the prostration of the plainest principles of equity and justice."

¹ *Pacific Mut. Ins. Co. v. Guse*, 49 Mo. 329; *Long Pond Ins. Co. v. Houghton*, 6 Gray (Mass.), 77; *Atlantic Ins. Co. v. Fitzpatrick*, 2 Gray (Mass.), 279; *Thomas v. Whallon*, 31 Barb. (N. Y.) 172; *In re Bangs*, 15 ib. 264; *American Ins. Co. v. Schmidt*, 19 Iowa, 502; *Savage v. Medbury*, 19 N. Y. 32; *Bangs v. Duckinfield*, 18 N. Y. 592; *Stow v. Wadley*, 8 Johns. (N. Y.) 124; *Bangs v. Gray*, 2 Ker. (N. Y.) 477; *Herkimer County Mut. Ins. Co. v. Fuller*, 14 Barb. (N. Y.) 373; *Devendorf v. Beardsley*, 23 ib. 656; *Appleton Mut. Fire Ins. Co. v. Jesser*, 5 Allen (Mass.), 446; *Ohio Mut. Ins. Co. v. Marietta Woollen Co.*, 3 Ohio St. 348.

² *Insurance Co. v. Jarvis*, 22 Conn. 133. It is said in *Kelly v. Troy Fire Ins. Co.*, 3 Wis. 254, that an assessment may be made in anticipation of losses, as otherwise great delay would be experienced in adjusting and paying them. But the objection urged in that case, that if assessments are made upon the premium notes before losses have occurred, the right to withdraw, upon payment of the share of losses assessable while the policy was in force, cannot be availed of, because money to pay assessments will be taken when no loss has occurred, may, perhaps, be entitled to more favor than was allowed in that case.

³ *Monmouth Mut. Fire Ins. Co. v. Lovell*, 59 Me. 564.

⁴ *St. Lawrence Mut. Ins. Co. v. Paige*, 1 Hilton (N. Y.), 430.

⁵ *People's Mut. Ins. Co. v. Westcott*, 14 Gray (Mass.), 440.

directors out of whom a president was to be chosen, though the president was chosen before the directors were.¹ And assessments can only be laid by the corporation, or a receiver clothed with such of its powers as may be necessary for winding up its affairs, under the direction of the court. An assignee of the corporation has no such power.²

§ 558. **Slight Errors do not invalidate Assessments.**—Slight and unintentional errors, however, in estimating the amount which it may be necessary to assess, or in making up the lists of those liable to assessment, will not vitiate the assessment, the assessment being substantially correct, made in good faith, and upon correct principles. Nor will assessments be invalidated by delay, not unreasonable, in making them; nor by variance at different times between the proportions of the cash premium to the amount of the deposit note, as against members suffering no injury thereby.³ Nor can an assessment be resisted on the ground that claims for losses found due, allowed by the directors, might have been successfully resisted on technical grounds.⁴ Nor need assessments be made literally “forthwith” after every loss, nor separately for each loss. Some reasonable and practicable rule approximating to it is sufficient.⁵ And if losses occur at one and the same time, sufficient to absorb all the company’s resources from premium notes, whether the notes be classified or not, one assessment, or call for the whole, will be valid.⁶

§ 559. **What Assessments may include — Set-off.**—The intentional omission of members who are liable to any considerable amount will vitiate the whole assessment.⁷ But the omission

¹ *Currie v. Mut. Ass. Co.*, 4 H. & M. (Va.) 318.

² *Hurlburt v. Carter*, 21 Barb. (N. Y.) 221.

³ *Marblehead Mut. Ins. Co. v. Underwood*, 3 Gray (Mass.), 210.

⁴ *Sands v. Hill*, 42 Barb. (N. Y.) 651.

⁵ *New England Mut. Ins. Co. v. Belknap*, 9 Cush. (Mass.) 140; *Shaughnessy v. Rensselaer Ins. Co.*, 21 Barb. (N. Y.) 605.

⁶ *Rheinhardt v. Alleghany County Mut. Ins. Co.*, 1 Penn. St. 359; *Commonwealth v. Mechanics’ Mut. Ins. Co.*, Sup. Jud. Ct. Mass., March, 1873, not yet reported; *Sands v. Sanders*, 28 N. Y. 416.

⁷ *Marblehead Mut. Fire Ins. Co. v. Hayward*, 3 Gray (Mass.), 208; *Herkimer County Mut. Ins. Co. v. Fuller*, 14 Barb. (N. Y.) 373; *People’s Eq. Mut. Ins. Co. v. Arthur*, 7 Gray (Mass.), 267.

of a few adjusted and cancelled policies, so small in amount as not materially to increase the assessment on the remainder, will not have this effect.¹ But in determining whether there are earned premiums available to pay losses, uncollectible and worthless claims may be disregarded.² And in fixing the amount to be assessed, interest on borrowed money, probable failures in the collection, a reasonable sum for the expense of collection, and a reasonable allowance by way of discount for prompt payment, may be taken into account.³ So may return premiums due on surrendered and cancelled policies.⁴ The amount of such overlay must be reasonable. Twenty-four per cent was held to be reasonable in People's Equitable Mutual Fire Insurance Company, Petitioners;⁵ but double the amount was held to be unreasonable and excessive, in the absence of special circumstances shown to justify it, in the case of the same company against Babbitt.⁶ Involuntary payments made under a prior illegal assessment may be treated as a portion of the just claims upon which to make the new assessment, and in the collection of the latter each member is to be credited with the amount of his payment under the illegal assessment.⁷ In Indiana, however, it appears that the statute prohibits any overlay to cover expenses.⁸ Where the assessments are to pay losses, and the premium on deposit notes is made payable by instalments as shall from time to time, agreeably to the by-laws, be required by the directors, the directors having ascertained that the company is liable for a loss, and that the company have not sufficient available funds to pay the loss, are first to ascertain who were members at the time of the loss, and to assess upon each such proportion thereof as his individual liability bears to the aggregate liability of all the members. The length of time which may have elapsed

¹ Fayette Mut. Fire Ins. Co. v. Fuller, 8 Allen (Mass.), 27.

² Maine Mut. Mar. Ins. Co. v. Neal, 50 Me. 301.

³ Jones v. Sisson, 6 Gray (Mass.), 288; Bangs v. Gray, 2 Ker. (N. Y.) 264; reversing s. c. 15 Barb. (N. Y.) 264.

⁴ Fayette Mut. Fire Ins. Co. v. Fuller, 8 Allen (Mass.), 27.

⁵ 9 Allen (Mass.), 319.

⁶ 7 Allen (Mass.), 235.

⁷ People's Eq. Mut. Fire Ins. Co., 9 Allen (Mass.), 319.

⁸ Sinissippi Ins. Co. v. Taft, 26 Ind. 246.

since membership began is not to be taken into account.¹ And although assessments cannot be made for losses occurring prior to membership, the inclusion of such losses will not invalidate the assessment as to those who were members when the losses occurred.² Where the policies ran for one, three, and five years respectively, the premiums for three years being at twice the rate for one, and those for five years at three times the rate for one, and in computing the amount to be assessed for each month's losses a basis was found by taking the whole of the premium for each yearly policy, one-third of that for each three years' policy, and one-fifth of that for each five years' policy, the court thought there was no such inequality as to require the assessment to be set aside.³ So where, after a former assessment has been adjudged illegal, it is found that two years before a large debt was due from the company, and that many of the members who paid the illegal assessment have become, by lapse of time, exempt from a new assessment, so that, if the debt should be assessed on policies which were in existence when the several items of debt accrued and are still liable to assessment, there would not be premium notes sufficient in amount to pay all, the whole debt may be taken as a unit, and assessed upon all the policies which were then outstanding, in proportion to the time of their existence and the amount of their premiums. And in making such assessment for just claims which have accrued within two years, the aggregate of the whole net expense, and of the sums received in payment of the illegal assessment during each year, may be divided by twelve to ascertain the average amount to be raised for each month during that year; to which may be added the losses in each month. And the sum thus ascertained may be taken to be the sum to be raised for each month, in proportion to the amount of the premiums paid therefor applicable to that month.⁴ But the assessment must not include the amount of a previous assessment for losses which have been paid.⁵

¹ *Herkimer County Mut. Ins. Co. v. Fuller*, 14 Barb. (N. Y.) 373.

² *Long Pond Mut. Fire Ins. Co. v. Houghton*, 6 Gray (Mass.), 77.

³ *Citizens' Mut. Fire Ins. Co. v. Sortwell*, 10 Allen (Mass.), 110.

⁴ *People's Eq. Mut. Fire Ins. Co., Petrs.*, 9 Allen (Mass.), 319.

⁵ *Cooper v. Shaver*, 41 Barb. (N. Y.) 151.

But a new assessment, calling for the whole amount due on a note, is valid, although there is a prior assessment calling for a part which is still uncollected.¹ Of course, if the prior assessment be illegal, it may be disregarded.² The liability to assessment is fixed at any time only by the amount of losses for which the company is at that time responsible, and it is not apportionable according to the ratio of time of the expired and the unexpired term of the policy, provided the amount of the losses is sufficient to absorb the whole.³ When this is the case, the assessment cannot be reduced, or any part of it withheld to provide future indemnity for members who have not already suffered loss. Where the whole proceeds of the conditional as well as the absolute funds — that is, cash, premium notes, and statute liability to assessment — are pledged to satisfy and make good the losses that have occurred, each one in turn, who suffers loss, is entitled to the full benefit of this pledge, according to the state of those funds when his loss occurs. This forbids any reduction of the fund when the whole is required to cover losses, either by apportionment, set-off, or otherwise. The directors of the company are not bound to provide for reinsurance either by reserving a fund therefor, or by an allowance to policy holders whose policies are cancelled; and they have no right to do so to the prejudice of the superior claims of those who have suffered losses upon their policies.

And if, in case of insufficiency, "a just average" is to be made in such proportion as the loss sustained by each party "bears to the whole amount of losses then remaining unpaid," this rule, established by the contract of the corporation with all its members alike, does not permit a set-off, even as between the company and those who have claims for losses, upon which they are entitled to a distributive share of the proceeds of the assessment.

Accrued profits, although credited to the several policies

¹ *Sands v. Sweet*, 44 Barb. (N. Y.) 108, overruling *Campbell v. Adams*, 38 Barb. (N. Y.) 132, to the contrary. See also *Jackson v. Van Slyke*, 44 Barb. (N. Y.) 116, note.

² *People's Mut. Fire Ins. Co. v. Allen*, 10 Gray, 301.

³ *Commonwealth v. Union Mut. Ins. Co.* Sup. Jud. Ct. (Mass.) March, 1873, not yet reported.

according to the share of each therein, remained as absolute funds of the corporation pledged to the payment of losses, until by expiration or cancellation of the policy its holder becomes entitled to withdraw the balance, after charging for losses as the "dividend due to his policy." The members are entitled to a dividend only of such profits as remain or are shown upon a valuation of their policies at the termination of their membership.

If the payment of expenses and losses and return premiums are only provided for, the insured is not entitled to withhold, or to have withheld for him, for his own future indemnity, any part of the fund; and, therefore, the loss of the unexpired term of his policy, whether by cancellation or by insolvency of the company, can give him no claim against the corporation, either as a debt, or by way of damages for non-fulfilment of its contract with himself.¹

§ 560. **Assessment — Classification of Risks and Funds.** — When a classification of risks is authorized by the charter, and the funds of one class are set apart to pay the losses in that class, the losses in both classes are payable by the company, and the assessment is in form by the company, and not by the particular class. The whole company acts for each particular class.² But, though the assessment be made by the company, the funds raised on notes in one department only must first be appropriated to pay the losses of that department.³ The directors cannot, however, classify risks and make different rates of assessment without the authority of the charter, or a vote of the members.⁴ Nor can the assessment be by classes, when authorized, unless the amounts insured in the respective classes have reached the required amount.⁵ And when assessment is by classes, and the means of one class are insufficient to pay the losses of that class, resort may be had to the other

¹ *Commonwealth v. Union Mut. Ins. Co.*, *ubi supra*.

² *Kelley v. Troy Fire Ins. Co.*, 3 Wis. 254.

³ *Allen v. Winne*, 15 Wis. 113.

⁴ *Thomas v. Achilles*, 16 Barb. (N. Y.) 491; *Currie v. Mut. Ass. Soc.*, 4 H. & M. (Va.) 315; *People's Eq. Mut. Ins. Co. v. Arthur*, 7 Gray (Mass.), 267.

⁵ *Augusta Mut. Ins. Co. v. French*, 39 Me. 522.

class, if any thing remains after paying the losses of that class.¹ If a certain class of funds is to be resorted to in the first instance for payment, these must be exhausted before others can be availed of by assessment.² But if there is no such distinction, all are to be assessed alike.³ And if the funds raised are to be appropriated for the payment of certain claims in successive order, the first must be paid *in toto* before any thing can be appropriated for the payment in the next succeeding class, as for return of premiums, for instance.⁴

§ 561. **Premium Notes, when recoverable to the full Amount without Assessment.** — In some cases it is provided by the charter or by-laws that, in case of neglect to pay an assessment for a specified time, the whole amount of the deposit note may be sued for and recovered. If, in such case, an assessment has been paid, the whole amount recoverable is the face of the note less the paid assessments,⁵ but without interest, as the right to recover the whole amount is in the nature of a penalty, which carries no interest.⁶ And the failure to pay such an assessment does not exclude the insured from his right to indemnity in case of loss, if the by-laws treat the note "as payment in advance" of the assessment,⁷ although the charter provides that if he neglect to pay an assessment he shall cease to have his property insured until he pays.

§ 562. **Notice of Assessment.** — Unless some special mode or form of notice of the assessment be required by the charter or by-laws, personal service will be sufficient publication.⁸

¹ *White v. Ross*, 15 Abb. Pr. (N. Y.) 66. In Massachusetts, by statute, where the affairs of an insurance company have been placed in the hands of a receiver, an assessment may be made by him, which, being ratified by the court, on a bill in equity, concludes all parties in interest; and, upon decree of confirmation, executions may issue for the respective amounts against those upon whom they are assessed. *Hamilton Mut. Ins. Co. v. Parker*, 11 Allen (Mass.), 574.

² *Long Pond Ins. Co. v. Houghton*, 6 Gray, 77.

³ *Fayette Mut. Fire Ins. Co. v. Fuller*, 8 Allen (Mass.), 27.

⁴ *Commonwealth v. Union Mut. Ins. Co.*, *ubi supra*; *Commonwealth v. Mass. Mut. Fire Ins. Co.*, *ibid.*

⁵ *Bangs v. Bailey*, 37 Barb. (N. Y.) 630.

⁶ *Ibid.*; *Bangs v. McIntosh*, 23 Barb. (N. Y.) 591.

⁷ *King v. Mut. Ins. Co.*, 20 N. H. 198.

⁸ *Jones v. Sisson*, 6 Gray (Mass.), 288; *York County Mut. Fire Ins. Co. v. Knight*, 48 Me. 75.

Nor need the notice specify the amount due on each note.¹ The rate per cent will be sufficient, or any notice which will enable the insured to determine by calculation the amount which he will be called on to pay, and not incumbered by matter which misleads.² And notice required to be by mail or otherwise is sufficient, if deposited in the post-office directed to the place of residence indicated in the policy. A change of residence not made known to the company is without effect upon them.³ If by the terms of the by-laws notice of an assessment is to be given, an action for recovery of the assessment cannot be maintained by the company or its receiver without first giving the notice.⁴ If, however, publication of notice for three weeks be required, and after assessment is made the company goes into the hands of the receiver, their being no company to give the required notice, actual notice by the receiver, before action brought, will suffice.⁵ The notice should not be given till the assessment is made.⁶ Notice of an intention to assess is not necessary, unless required by the by-laws or charter. Assessments at the regular meeting of the directors are presumably a part of the business of the company, and no notice is required. And as this is a part of the duty of the directors, made so by statute, a by-law authorizing the directors to lay an assessment at a meeting called for that purpose neither restricts nor enlarges the power of the directors.⁷ The notice, when required, should be given to the member of the company insured, although there has been an assignment of the policy with the consent of the company ;⁸ unless by the giving a new premium note, or assuming the liability on the original, the assignee becomes a

¹ *Atlantic Mar. and Fire Ins. Co. v. Sanders*, 36 N. H. 252. •

² *Bangs v. Duckingfield*, 18 N. Y. 592.

³ *Lothrop v. Greenfield Stock and Mut. Fire Ins. Co.*, 2 Allen (Mass.), 82.

⁴ *Williams v. Babcock*, 25 Barb. (N. Y.) 109.

⁵ *Cooper v. Shaver*, 41 Barb. (N. Y.) 151.

⁶ *Bangs v. McIntosh*, 23 Barb. (N. Y.) 591.

⁷ *Bay State Mut. Fire Ins. Co. v. Sawyer*, 12 Cush. 64 ; *Fayette Mut. Fire Ins. Co. v. Fuller*, 8 Allen (Mass.), 27.

⁸ *Brannin v. Mercer County Mut. Ins. Co.*, 4 Dutch. (N. J.) 92.

member ; in which case he should be notified, and not the original insured.¹

§ 563. **Mutual Insurance — Lien — Contract with Parties out of the State.** — A mutual insurance company of New York, empowered to do business in a particular county, and having by its charter a lien upon real estate insured by it upon filing notice, it has been held in Canada, cannot make there a valid contract with a citizen of Canada for the insurance of his buildings. Such a contract is void *ab initio*. There could be no mutuality in such a contract, and the insured could not subject his property to the required lien.² But in an action against the same company, the New York courts held that the company might lawfully make in New York a contract to insure personal property situated in Canada and belonging to a person residing there.³ And it is well settled that as between the States of the Union mutual insurance companies incorporated by one State may make in other States valid contracts of insurance, both of the real and personal property of citizens of other States, although doubtless without the permission of the foreign State, no lien in such case will attach to the real estate. The practice of mutual insurance companies to insure both real estate and personal property upon which they can have no lien is generally, if not universally, upheld.

§ 564. **Liability of Directors for neglecting to assess, strictly construed.** — The insurance company, of which the appellees were directors, issued a policy to the appellant upon his barn, which was afterward destroyed by fire. The company adjusted the loss and gave the appellant a note for one thousand dollars, the amount of the loss, and received from him a written receipt, discharging the company from all further claims on account of the fire. This note the company afterward took up, paying part of the amount in cash, and giving a new note for the remainder, upon which the appellant afterwards brought suit and recovered a judgment. The directors failed to satisfy

¹ Bowditch Mut. Fire Ins. Co. v. Winslow, 3 Gray (Mass.), 415.

² Genesee Mut. Ins. Co. v. Westman, 8 Upper Canada (Q. B.), 487.

³ Western v. Genesee Mut. Ins. Co., 2 Ker. (N. Y.) 258.

the execution issued upon the judgment, or to make an assessment. The statute touching insurance companies provided that "whenever sufficient goods or estate of any such corporation cannot be found to satisfy an execution issued against them upon a judgment recovered on a policy by them made, and the said corporation have goods or estate to satisfy such execution, and the directors shall neglect or refuse to pay the same; or if the directors shall for thirty days after the rendition of such judgment refuse or neglect to make such an assessment as they may be authorized to make therefor, and to deliver the same to the treasurer for collection, or fail to apply such assessment when collected toward satisfying such execution, then, in either of the cases aforesaid, the directors shall be personally liable for the whole amount of such execution." This being in the nature of a penal statute, inflicting upon the directors the penalty of a personal liability for a failure to pay the execution, or to make and properly apply the assessment, must therefore be construed with some degree of strictness, and cannot be extended beyond the cases fairly within its terms, in order to meet those that might be conceived to be within the spirit and object of the law. And where the legislature provides the personal remedy against the directors only in cases where there has been a judgment against the corporation on a policy, the court cannot extend the remedy to cases where a judgment has been recovered on something else than a policy.¹

¹ *Raber v. Jones*, Sup. Ct. Ind., 2 Ins. L. J. 514.

CHAPTER XXVI.

OF REMEDIES, EVIDENCE, PLEADING, BANKRUPTCY.

§ 565. **Insured against Insurer — Refusal to deliver Policy.** — It not unfrequently occurs that, the parties having come to an agreement upon the terms of the contract before the delivery of the policy, a fire or some other event intervenes, and the company refuses to deliver the policy or to admit its liability. In such case two courses are open to the insured. He may resort to a court of equity to compel the delivery of the policy, when, in a proper case, the court, having jurisdiction to compel specific performance, will, to avoid circuity of action, decree payment for the loss, as if a policy had issued.¹ Or a suit at law will be sustained, upon competent and satisfactory evidence, whether verbal or written, to show the terms of the contract.²

§ 566. **Insured against Insurer — Reform of Contract.** — Where the insured is likely to be met with the defence that there is falsehood in his answers contained in the application, and he would avail himself of the reply that he was misled by the insurers or their agent, he will carefully consider how he will seek his remedy. In some States the courts of law feel obliged, under the strict rules of evidence which govern

¹ *Rhodes v. Railway Passengers' Ins. Co.*, 5 Lansing (N. Y.) 71; *Union Mut. Ins. Co. v. Com. Mut. Mar. Ins. Co.*, 2 Curtis (C. Ct. U. S.), 524; s. c. affirmed, 19 How. (U. S.) 318; *Fraed v. Royal Ins. Co.*, N. Y. Ct. of App., 2 Ins. L. J. 126; *Franklin Fire Ins. Co. v. Hewitt*, 3 B. Mon. (Ky.) 231; *Harris v. Columbus County Mut. Fire Ins. Co.*, 18 Ohio, 116.

² *Perkins v. Washington Ins. Co.*, 4 Cow. 645; *Kentucky Mut. Ins. Co. v. Jenks*, 9 Ind. 96; *Hamilton v. Lycoming Ins. Co.*, 5 Penn. St. 339; *Whittaker v. Farmers' Union Ins. Co.*, 29 Barb. (N. Y.) 312; *City of Davenport v. Peoria Mar. and Fire Ins. Co.*, 17 Iowa, 276; *Hallock v. Commercial Ins. Co.*, 3 Dutch. (N. J.) 645, affirming s. c. 2 ib. 268; *Sussex County Mut. Ins. Co. v. Woodruff*, 2 ib. 541; *Shelden v. Conn. Mut. Life Ins. Co.*, 25 Conn. 207. And see also *ante*, § 23.

such courts, to deny him the privilege of proving the facts, and so he will fail in his suit; while the same courts, perhaps, had their aid been invoked in equity, would have found some way in which the facts might have been available.¹ In most of the States, however, courts of law will apply the doctrines of waiver and estoppel, so as to enable the plaintiff to maintain his action for indemnity, and not drive him to a court of equity.² And where this is not permitted, a court of equity may be applied to to reform the contract, if it does not conform to the agreement, as made by mistake of law or fact, or procured by fraud, so that an action at law can be maintained.³ And in this case, as in the case of a bill in equity to enforce specific performance by delivery of the contract, the court having jurisdiction to reform, and for the same reason, will decree damages.⁴ The evidence, however, in such case must be clear and satisfactory. If there be doubt as to what was the statement of the applicant, or the agreement of the parties, or a conflict of testimony, the court will not aid the plaintiff. The affirmative is upon him, and he must show what statement he made, and what the agreement was. The fact that the statement is not true, and the presumption that he would not make a false statement, the effect of which would be to invalidate the policy, are not enough. Where the court is called upon to reform a contract on account of mistake, it must appear that the mistake was mutual, and this by the most clear and distinct evidence, free from all reasonable doubt.⁵ Or, again, a

¹ Holmes et al. v. Charlestown Mut. Fire Ins. Co., 10 Met. (Mass.) 211; Barrett et als. v. Union Mut. Fire Ins. Co., 7 Cush. (Mass.) 175.

² Wilson v. Conway Mut. Fire Ins. Co., 4 R. I. 141. And see *ante*, §§ 143, 144, 498 *et seq.*

³ Oliver v. Com. Mut. Mar. Ins. Co., 2 Curtis (C. Ct. U. S.), 277; Phoenix Ins. Co. v. Hoffheimer, 46 Miss. 645; Collett v. Morrison, 12 Eng. L. & Eq. 171; Phoenix Ins. Co. v. Gurnie, 1 Paige (N. Y.), 278; Longhurst v. Star Ins. Co., 19 Iowa, 364; Neville v. Merch. and Manuf. Ins. Co., 19 Ohio, 452; New York Ice Co. v. North West. Ins. Co., 23 N. Y. 357, reversing s. c. 10 Abb. Pr. (N. Y.) 341; Stout v. Fire Ins. Co. of New Haven, 12 Iowa, 371; Perry v. Newcastle Dist. Mut. Fire Ins. Co., 8 Upper Canada (Q. B.), 363.

⁴ *Ibid.*

⁵ *Ibid.*; Nat. Ins. Co. v. Crane, 16 Md. 260; Suydam v. Columbus Ins. Co., 18 Ohio, 459; Cooper v. Farmers' Mut. Fire Ins. Co., 50 Penn. St. 299; Tinsion v. Atlantic Mut. Ins. Co., 40 Mo. 33; Parsons v. Bignold, 15 L. J. N. S. (Ch.) 379,

court of equity will, in a proper case, enjoin the insurers from setting up a defence which would be fraudulent or grossly inequitable and unjust.¹

§ 567. **Recovery back of Premium.**—If a policy be void *ab initio*, or if the risk never attaches, and there is no fraud on the part of the insured, and the contract is not against law or good morals, he may recover back all the premiums he may have paid, either in an action for them alone, or on a count for money had and received, coupled with a count on the policy in an action for the loss.² So where the premium is applicable to two risks, and one never attaches, the premium paid on the latter, if ascertainable, may be recovered back.³ So if the insured, after alienation, has the option to surrender his policy and take up his deposit note, he may recover back so much of the premiums paid as may not be required for the payment of losses up to the time of the surrender.⁴ And such doubtless would be the case where premiums are paid after forfeiture of the policy, in the belief that the forfeiture has been waived.⁵ But if the policy be obtained by means of fraudulent misrepresentation, for that reason, though the risk never attaches, the premium cannot be recovered back.⁶ So if the policy be an illegal contract, neither party can have any remedy in the courts against the other.⁷ But if the risk once attaches, the premium is not apportionable.⁸ The promise of

per Lyndhurst, L. C.; *Van Twyl v. West Chester Fire Ins. Co.*, N. Y. Ct. of App., Alb. L. J. Nov. 1, 1873; *Salms v. Rutgers Fire Ins. Co.*, 8 Bosw. (N. Y.) 578.

¹ *Woodbury Sav. Bank v. Charter Oak Ins. Co.*, 31 Conn. 518.

² *Clark v. Manufrs. Ins. Co.*, 2 Woodb. & Minot (C. Ct. U. S.), 472; *Mut. Ass. Co. v. Mahon*, 5 Call (Va.), 517; *Tyrie v. Fletcher*, Cowp. 668; *Fowler v. Scottish Eq. Life Ins. Co.*, 28 L. J. Ch. 225; *Rochester Ins. Co. v. Martin*, 13 Minn. 59; *Foster v. U. S. Ins. Co.*, 11 Pick. (Mass.) 85.

³ *Bunyon, Insurance*, 95.

⁴ *Sullivan v. Massachusetts Mut. Fire Ins. Co.*, 2 Mass. 318.

⁵ *McKee v. Phoenix Ins. Co.*, 28 Mo. 383.

⁶ *Friesmouth v. Agawam Mut. Ins. Co.*, 10 Cush. (Mass.) 587; *Hoyt v. Gilman*, 8 Mass. 336.

⁷ *Browning v. Morris*, Cowp. 790; *Andree v. Fletcher*, 2 T. R. 161; *Howson v. Hancock*, 8 T. R. 575; *Russell v. De Grand*, 15 Mass. 35.

⁸ *Bermon v. Woodbridge*, Doug. 781; *Fulton v. Lancaster Ins. Co.*, 7 Ohio, 325; *Merchants' Ins. Co. v. Clapp*, 11 Pick. (Mass.) 56.

an agent of a company at the time of the delivery of the policy, which was objected to on certain grounds, but accepted and acted upon by the payment of premiums, that the company would make it all right, will not authorize a subsequent disaffirmance of the contract and recovery back of the premium by the insured.¹ But in such case the insured may compel the execution and delivery of a valid policy.²

§ 568. **Insured against Insurer — Suit to revive Policy declared forfeited, or to recover back Premiums paid.** — *Cohen v. New York Mutual Life Insurance Company*³ presented the case of an insured, who, on the breaking out of the war, was compelled thereby to suspend the payment of the annual premiums as required by the policy, but, on the termination of the war, tendered the whole amount due. The insurers refusing to accept, the insured brought suit to compel acceptance and to have the policy declared valid, or to compel the return of premiums theretofore paid. The court upheld the action against the objections of the defence. "The defendant also objects," said the court by Allen, J., "to the right of the plaintiff to maintain an action at this time, there having been no loss, and therefore no cause of action under the policy. The allegations of the complaint are, that the plaintiff has tendered the premiums due, and that the defendant refused them, and declared the said policy cancelled and forfeited. This is a peculiar case, and there are many reasons, unless there is some rigid rule forbidding the court to entertain jurisdiction, why it should determine the matters in controversy at this time. 1. There is an actual controversy existing, and the only parties to it are before the court. There is not the reason for declining jurisdiction that presented itself in some of the cases cited by the defendant, as in *Grove v. Bastard*,⁴ that all the parties in interest could not be heard and their rights determined. 2. Present rights under the policy, and incident

¹ *Mecke v. Life Ins. Co. of New York*, 8 Phila. Rep. 6.

² *Perry v. Newcastle Dist. Mut. Fire Ins. Co.*, 8 Upper Canada (Q. B.), 363. And see also *ante*, § 544.

³ 50 N. Y. 610, overruling the same case cited *ante*, § 41, upon the point that the failure to pay the premiums as they fell due worked a forfeiture; 2 Ins. L. J. 426.

⁴ 2 Ph. (Eng. Ch. 22), 619.

to it, are denied the plaintiff. Her policy having been declared forfeited and cancelled, she is excluded from the privileges and denied the rights which belong to her as a member of the company. She is entitled, unless the claim of the defendant is well grounded, at once and all times to the privileges of other policy-holders, and to be recognized as such. 3. The plaintiff is entitled, if the right to pay the premiums and continue the policy still exists, to pay the arrearages and stop the accruing of interest, and to make the future payments as they accrue and become due, without interest, and relieve herself as well of the risk and burden of retaining the money which of right belongs to the defendant. 4. The contract of insurance where the policy is to be kept alive by periodical payments is peculiar; and the duty to pay, and obligation to receive, are mutual. It is somewhat different from a simple obligation to pay money, a tender to perform which would bar an action upon it. So, too, a receipt or acknowledgment of the payment is customarily given, and is as essential as evidence of the continuance of the contract as is the original policy. The policy-holder is entitled to some evidence of the performance of the condition on his part, if, as is believed, the universal usage is for the insurers to certify in some way the fact that the annual premiums are paid. 5. It is fit and proper that both parties to the contract should know their rights. Especially is it important to the plaintiff and the insured that if this policy is avoided they may seek insurance elsewhere, and if valid, that they may perform the conditions of the policy. In ordinary cases courts will not, in advance of any present duty, obligation, or default, declare the rights and obligations of suitors; they will do it where peculiar circumstances render it necessary to the preservation of right. It was done in *Baylies v. Payson*.¹ In *McKee v. Phoenix Insurance Company*,² where a wife insured the life of her husband, and, after making several payments, obtained a divorce, but continued to pay the annual premiums after the divorce, until the company refused to receive them, on the ground that she no longer had an insurable interest, it was held that the

¹ 5 Allen, 473.

² 28 Mo. 383.

refusal was wrongful, and the insured might, if she chose, treat the contract as at an end, and recover back all the premiums she had paid. In *Girdlestone v. North British Mercantile Insurance Company*, a bill was brought to compel the insurers to reinstate the insured, in a policy which the insurers claimed had lapsed by the failure of the insured to pay his premium. And the court, in aid of the bill, ordered the defendants to answer certain interrogatories relative to the plaintiff's case.

§ 569. **Recovery back of Premium.** — In *Leonard v. Washburn*,¹ an agent of a foreign insurance company took the acceptance of the applicant for the premium to be paid, and agreed to procure and deliver a policy, which he accordingly did, in the usual form of policies issued by the office. The terms of the policy proving objectionable to the applicant, a modification was obtained, but, being still unsatisfactory, the applicant refused to accept it, and demanded a return of his acceptance. But this had been negotiated, and the proceeds forwarded to the company on the receipt of the policy. The acts of the agent were in contravention of his instructions as to the receipt of the premium; but the policy had been issued under such circumstances that it would be valid. The applicant paid his acceptance at maturity, and then brought suit against the agent to recover the amount. But it was held that as the agent had done all he had agreed to do, and the policy actually issued was a valid one, the action could not be sustained. The statute prohibiting foreign insurance companies from recovering premiums or assessments, unless they have complied with certain requirements as to the appointment of agents, — non-compliance with which was the case here, — it was also held, did not invalidate the policy, nor give the applicant a right to recover back a premium actually paid for a valid policy.

§ 570. **Insured against Directors — Premiums — Loss.** — Directors and others making or permitting false statements as to the condition and assets of an insurance company, whereby a party is induced to insure in a worthless company, are personally liable to him in an action at law for the deceit,² although

¹ 100 Mass. 251.

² *Salmon v. Richardson*, 30 Conn. 360.

no actual damage has been sustained beyond the payment of the premiums.¹ Where directors are made liable if they do not promptly assess to pay losses, the liability will be strictly construed. And if a loss be settled by the company by giving its note, a failure to assess to pay the note is not within the liability.²

§ 571. **Mutual Insurance — Dividend.** — Where a dividend which has been made proves to be incorrectly computed, the company may be compelled, at the suit of a stockholder, to readjust and correct the same.³

§ 572. **Forfeiture — Equitable Adjustment.** — Where a policy becomes forfeited by violation of its terms, a clause providing that in such case “the party interested shall have the benefit of such equitable adjustment as may from time to time be provided by the board of directors,” does not give the courts the right to compel an adjustment, unless, perhaps, the directors, having established general rules upon the subject, might be held to abide by these rules in the particular case.⁴

§ 573. **Insurers against Insured — Policy obtained by Fraud.** — Equity will also interfere to compel the surrender of a policy wrongfully obtained or delivered under a mistake of the facts, induced by the misrepresentation or concealment of the assured. So it was decreed in a recent case,⁵ even when the policy had been assigned for value, without notice of the concealment. The insured had made his proposal, which, after the usual examination, was accepted, and he was duly notified of the acceptance. He was at the same time notified that until payment of the premium the company incurred no risk, and that any alteration in the mean time in his health would render the policy invalid, unless disclosed to the insurers before the actual receipt of the premium. After this notice, and before payment of the premium, the insured was told by a special physician, whom he travelled a considerable

¹ *Pontifex v. Bignold*, 3 M. & G. 42; *Tebbetts v. Hamilton Mut. Ins. Co.*, 3 Allen (Mass.), 569.

² *Ante*, § 564.

³ *Luling v. Atlantic Mut. Ins. Co.*, 45 Barb. (N. Y.) 510.

⁴ *Nightingale v. State Mut. Life Ins. Co. of Worcester*, 5 R. I. 38.

⁵ *The British Eq. Ass. Co. v. The Great Western Railway Co.*, 20 L. T. S. S.

distance to consult, that he was dangerously ill, his ordinary medical attendant, however, advising him that he considered the appearances, upon which the physician first consulted predicated his opinion, as of a temporary character only. After all these facts had transpired, the assured forwarded his check for the amount of the premium, making no mention of the facts about his health, but leaving this question to stand upon his original answers that he was well, and had always been well, and could not recollect that he ever had any illness, and received his policy. But the court, in a bill in equity, brought by the insurers against the assignee to compel him to deliver up to them the policy, decreed for the complainant, on the ground that the policy was void, both because of the suppression of the facts transpiring after notice of the acceptance of the proposal, and because the answers contained in the policy, as to the health of the insured, were not true, as of the date when the premium was paid and the policy issued.¹ If a policy of insurance be obtained by fraud, and with the intent to defraud, which gives an apparent cause of action to the holder against the company, the court, on a bill in equity, will order the policy to be delivered up and cancelled;² but will not interfere where there is nothing to show that the fraud may not be set up in defence as well, as completely at law as in equity.³

§ 574. **Right to cancel Policy strictly construed.** — This right can only be exercised within the limits of good faith. A substantial change in the circumstances increasing the risk is the usual and sufficient ground on the part of the insurers. But they cannot avail themselves of such a right in the face of a fire actually threatening the destruction of the property insured; because,

¹ This was in affirmation of the judgment of Malins, V. C., in the same case, 19 Law Times, N. S. 476. Upon the question of jurisdiction, the following cases were cited: *Slim v. Croucher*, 1 De G., F. & J. 518; *Jones v. The Provincial Ins. Co.*, 3 C. B. N. S. 65; *Fowkes v. The Manchester and London Life Assur. Ass.*, 3 Best & Sim. 917; *Traill v. Baring*, 4 Giff. 485; *Thornton v. Knight*, 16 Sim. 509; *The Prince of Wales Ass. Co. v. Palmer*, 25 Beav. 605.

² *Commercial Ins. Co. v. McLoon*, 14 Allen (Mass.), 351; *French v. Connelly*, 2 Anstruther, 454.

³ *Phoenix Ins. Co. v. Bailey*, 17 Wall. (U. S.) 616; *Home Ins. Co. v. Stanchfield*, C. Ct. U. S., Dist. of Minn., 2 Abb. C. C. 6.

if this could be done, a policy of insurance would be in many cases worthless, since it would be possible, in every case where fire approaches from without, to give notice of cancellation, and thus escape all risk under the policy.¹ And the right can only be exercised by a strict compliance with the terms and conditions upon which it is admissible. And if refunding the premium, or a portion of it, be one of the terms, there must be a payment or tender. An agreement with the insured that he shall return the policy to be cancelled, and receive his premium, is no cancellation.²

§ 575. **Insurers against Insured — Recovery back of Loss paid.** — If a loss be paid under a mistake of facts pertaining to the loss, as distinguished from facts inducing the contract, which, if known to the insurers, would have enabled them to successfully resist the claim, they may recover back the amount so paid.³ In *Columbus Insurance Company v. Walsh*,⁴ where a loss had been paid in ignorance of the fact that the policy had become void by subsequent insurance, obtained without assent, and contrary to the provisions of the policy, the insurers were allowed to recover it back. And it has been said that this is so whether the company so paying has the means of knowing the facts or not.⁵ But it was recently held in New York, in a case which was very elaborately argued and well considered, that insurers cannot be permitted, in the absence of fraud upon them, to reopen and try a case, upon a ground which might have been presented and tried when the claim was made under the policy for the loss; as, for instance, that the policy was void for misrepresentation, of which they were aware at the time of payment of the loss, or might have been upon due inquiry.⁶

¹ *Home Ins. Co. v. Heck*, Supreme Ct. Ill., 2 Ins. L. J. 437.

² *Hathorn v. Germania Ins. Co.*, 55 Barb. (N. Y.) 28. See also *ante*, §§ 67-69, on the subject of the right of cancellation.

³ *Mut. Life Ins. Co. v. Wager*, 27 Barb. (N. Y.) 354; *Hartford Live Stock Ins. Co. v. Matthews*, 102 Mass. 221; *Berkshire Mut. Fire Ins. Co. v. Sturgis*, 13 Gray (Mass.), 177; *McConnell v. Delaware Ins. Co.*, 18 Ill. 228.

⁴ 18 Mo. 229.

⁵ *De Hahn v. Hartley*, 1 T. R. 343; *Kelley v. Solari*, 9 M. & W. 55.

⁶ *Mut. Life Ins. Co. v. Wager*, 27 Barb. (N. Y.) 354.

§ 576. **Remedy — Agents against Insurers — Commissions.** —

An insurance agent who has voluntarily left the service has no claim to subsequently accruing commission on policies he obtained.¹ And though, in the case last cited, the jury were instructed that if the agent was dismissed he would have a claim, yet the Supreme Court of the United States has decided that the fact that the agent leaves the service of the company involuntarily does not give him a claim.²

§ 577. **Remedies by and against Foreign Insurance Companies.** — Where foreign insurance companies are prohibited by statute from entering into contracts of insurance until they have complied with certain conditions, it is generally held that they cannot recover on their premium notes until they have so complied.³ But a compliance after the negotiation of the contract will permit a recovery.⁴ And a subscription to stock, payable in instalments, is also recoverable. The prohibition does not apply to stock notes given as part of the capital in organizing the company; nor is the taking of such notes "doing business," within the meaning of a statute which prohibits foreign insurance companies from doing business except under certain conditions. In Missouri, it is held that recovery may be had without such compliance.⁵ In some of the States, policies issued under such circumstances are held to be valid;⁶ in Indiana, they are held to be invalid.⁷ In *Haverhill Insurance Company v. Prescott*,⁸ the suit was on a note, and the question of the validity of the policy did not arise.

¹ *Shaw v. Home Life Ins. Co.*, N. Y. Ct. of App., 49 N. Y. 681; *Myers v. Knickerbocker Life Ins. Co.*, Cuyahoga C. P. (Penn.), 2 Bigelow's Digest, 149.

² *Partridge v. Phoenix Mut. Life Ins. Co.*, 15 Wall. (U. S.) 458.

³ *Jones v. Smith*, 3 Gray (Mass.), 500; *Wash. County Mut. Ins. Co. v. Davies*, 6 Gray (Mass.), 376; *Same v. Hastings*, 2 Allen (Mass.), 398; *General Mut. Ins. Co. v. Philips*, 13 Gray (Mass.), 90; *Ætna Ins. Co. v. Harvey*, 11 Wis. 394; *Williams v. Cheney*, 8 Gray (Mass.), 206; *Cincinnati Mut. Health Ins. Co. v. Rosenthal*, 55 Ill. 85; *Ford v. Buckeye State Ins. Co.*, 6 Bush (Ky.), 135.

⁴ *National Mut. Fire Ins. Co. v. Purcell*, 10 Allen (Mass.), 231.

⁵ *Clarke v. Middleton*, 19 Mo. 53; *Columbus Ins. Co. v. Walsh*, 18 Mo. 229.

⁶ *Columbus Ins. Co. v. Walsh*, *ubi supra*; *Leonard v. Washburn*, 100 Mass. 251; *Hartford Live Stock Ins. Co. v. Matthews*, 102 Mass. 221.

⁷ *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520. But see *Hoffman v. Banks* in the same State, 2 Ind. L. J. 348.

⁸ 42 N. H. 547.

§ 578. **Foreign Insurance Company — Right to remove Action.** — If a foreign insurance company submits itself to the exclusive jurisdiction of the courts of a State, as a condition of the privilege of doing business in that State, it waives any right it may possess as a *quasi* citizen of another State to remove to the courts of the United States an action commenced in the courts of such State, upon a cause of action accruing there.¹

§ 579. **Evidence.** — The general rules of evidence, as laid down in the special treatises on that subject, are applicable to the contract of insurance as well as to other contracts. It is only to some special applications that we shall refer.

§ 580. **Evidence — Experts.** — In *Joyce v. Maine Insurance Company*,² it was decided that an expert in insurance matters could not be permitted to give his opinion whether “the rate of premium for insurance would be increased by vacating a dwelling-house.” The condition, made part of the contract, made the insurance void and of no effect if the risk should be increased by any means whatever within the control of the insured. It was said not to be a question of science or skill. So it has been held, and for a like reason, that, under substantially similar terms of the contract insurance, experts could not be permitted to testify whether “leaving a dwelling-house unoccupied for a considerable length of time” was an increase of risk.³ And generally their opinions as to the materiality of certain facts to the risk are incompetent.⁴ But in *Schenck v. Mercer County Mutual Insurance Company*,⁵ a fireman was allowed to testify whether the risk of fire was increased by certain alterations; and it was decided in the case last cited from

¹ *Glens Falls Ins. Co. v. Judge of Jackson Circuit Court*, 21 Mich. 577. The statute (Laws of Mich. 1869, p. 243) provided that no insurance company should transact business in that State without first appointing an agent or attorney “on whom process of law can be served, *which* process shall issue from the courts of this State, and such courts shall have exclusive jurisdiction of all cases arising under this act.” See also *Stevens v. Phoenix Ins. Co.*, 24 How. (N. Y.) 517.

² 45 Me. 168.

³ *Luce v. Dorchester Mut. Fire Ins. Co.*, 105 Mass. 298.

⁴ *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72; *Hartford Prot. Ins. Co. v. Harmer*, 2 Ohio St. 452. *Contra*, *Kern v. South St. Louis Mut. Fire Ins. Co.*, 40 Mo. 19.

⁵ 4 Zab. (N. J.) 447.

Massachusetts that the question, whether such leaving a dwelling-house unoccupied is material to the risk, might be tested by the question whether underwriters generally would in such case charge a higher premium.¹ The first question was said to be as to a subject within common knowledge, as to which opinions were inadmissible, while the latter related to a matter which was within the peculiar knowledge of persons versed in the business of insurance. The distinction, though fine, seems to be sound ; it is between an inadmissible opinion and an admissible fact. The inference of increased risk, based upon the fact known to him of a higher rate of premium in such cases, cannot be stated by the witness ; but he may state the fact, which is to him a matter of special knowledge, and from this the jury may draw the inference of increased risk. That persons having this peculiar knowledge may testify thereto is a well-settled rule of evidence.²

§ 581. **Evidence — Experts.** — In life insurance, physicians may give their opinion as to the causes of disease, and whether a particular disease or infirmity or injury or habit is the cause of death, or tends to shorten life ;³ but neither they nor experts in insurance can be allowed to give their opinion upon the question whether the applicant was an insurable subject, nor whether certain facts render the subject uninsurable.⁴

§ 582. **Evidence — Custom.** — Evidence of a particular custom of the insurers, not brought home to the knowledge of the insured, is inadmissible.⁵ But evidence of a general custom of insurance companies, as, for instance, to charge a higher rate of premium on unoccupied dwelling-houses, is

¹ And see also *Merriam v. Middlesex Ins. Co.*, 21 Pick. 162; *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416.

² *Webber v. Eastern Railroad Co.*, 2 Met. (Mass.) 147; *Mulry v. Mohawk Valley Ins. Co.*, 5 Gray (Mass.), 541; *Hawes v. New England Ins. Co.*, 2 Curtis (C. Ct.), 229; *Lyman v. State Ins. Co.*, 14 Allen (Mass.), 329; *Hartman v. Keystone Ins. Co.*, 21 Penn. St. 466; *Quin v. National Ass. Co.*, *Jones & Cary* (Irish), 316.

³ *Miller v. Mut. Ben. Life Ins. Co.*, 31 Iowa, 216.

⁴ *Rawles v. Am. Life Ins. Co.*, 36 Barb. 357; s. c. affirmed, 27 N. Y. 282.

⁵ *Adams v. Otterbach*, 15 How. (U. S.) 539; *Carter v. Boehm*, 3 Burr. 1905; *Hartford Prot. Ins. Co. v. Harmer*, 2 Ohio St. 452; *Luce v. Dorchester Mut. Fire Ins. Co.*, 105 Mass. 298; *Taylor v. Ætna Life Ins. Co.*, 13 Gray (Mass.), 434.

admissible, on the issue whether there is an increase of risk in a case where a dwelling-house occupied at the time of insurance was afterwards left unoccupied.¹ So of a general custom of insurance companies to give thirty days' grace for the payment of the annual premiums.² So the usage of life insurance companies is competent evidence, in a question between them and their agents as to the nature and amount of interest the latter may have in the policies they procure.³

§ 583. **Evidence — Wilful Burning.** — Where the defence to an action on a policy of insurance involves the proof of a crime, as the wilful setting fire to the premises, or the designedly casting away a vessel, the authorities differ upon the question of proof whether the rule in civil or criminal cases shall be the guide. In *Thurtell v. Beaumont*,⁴ the jury were instructed that they must be as clearly satisfied of the fact as if the insured were on trial on the criminal charge. And this rule was adopted in the very recent case of *Shultz v. Pacific Insurance Company*.⁵ And so it has been held in Maine,⁶ on the authority of *Thurtell v. Beaumont*, and apparently in Illinois,⁷ though the point was not much considered. But reason and the weight of authority are the other way.⁸

§ 584. **Evidence — Issue of Policy — Signing Application — Receipt of Premium — Organization of Company.** — The recital in a premium note that a policy has issued, is *prima facie* evidence of that fact against the maker of the note.⁹ So the statement of the secretary that a policy has issued, in an action of covenant on a lost policy, is sufficient evidence that the pol-

¹ *Luce v. Dorchester Mut. Fire Ins. Co.*, 105 Mass. 298.

² *Helme v. Phila. Life Ins. Co.*, 61 Penn. 107. But see *contra*, *Mut. Ben. Life Ins. Co. v. Ruse*, 8 Geo. 584.

³ *Ensworth v. New York Life Ins. Co. (C. Ct. U. S.)*, North Dist. Ohio, 7 Am. Law Reg. N. S. 332.

⁴ 1 Bing. 339.

⁵ Sup. Ct. of Florida, 2 Ins. L. J. 495.

⁶ *Butman v. Hobbs*, 35 Me. 227.

⁷ *McConnell v. Delaware Ins. Co.*, 18 Ill. 228.

⁸ *Schmedt v. N. Y. Union Mut. Fire Ins. Co.*, 1 Gray (Mass.), 529; *Washington Ins. Co. v. Wilson*, 7 Wis. 169; *Wightman v. West. Mar. and Fire Ins. Co.*, 8 Rob. (La.) 442; *Hoffman v. Same*, 1 La. An. 216; *Scott v. Home Ins. Co.*, 1 Dillon (C. Ct. U. S.), 105.

⁹ *New England Mut. Fire Ins. Co. v. Belknap*, 9 Cush. (Mass.), 140.

icy was issued.¹ The court were divided in *Foster v. Mentor Life Assurance Company*,² on the question whether the insured, having accepted a policy reciting that he had signed the declaration, might show to the contrary, two judges thinking the jury should decide the question of signature, and two holding that the jury should be instructed that the recital was *prima facie* proof of the signature. And by the weight of authority the recital in a policy of the receipt of the premium is *prima facie*, and only *prima facie*, evidence of the fact.³ But the contrary seems to be the rule in Illinois.⁴ The production of a premium note, signed by the insured, is also *prima facie* evidence, as against him, that the company is duly organized.⁵

§ 582. **Evidence — Chronic Disease — State of Health.** — A *post mortem* examination, fifteen hours after death, in New Orleans, in October, developing an inflammation and ulceration of the intestines, which in the opinion of the physicians had been of long standing, is not sufficient evidence of chronic disease existing in June of the same year, in a climate where fifteen hours of mortification may have made great ravages, especially if at that time he appeared in perfect health.⁶ In *Schaible v. Washington Life Insurance Company*, a photograph of the deceased, taken a short time before the insurance was effected, was permitted to go to the jury as evidence of the physical appearance and condition of the assured at that time.⁷

§ 583. **Evidence — Effect of Misrepresentation.** — In *Washington Life Insurance Company v. Harvey*, the president of the insurance company which issued the policy was not per-

¹ *Sussex County Mut. Ins. Co. v. Woodruff*, 2 Dutch. (N. J.) 542; *Harding v. Carter, Park*, Ins. 5.

² 3 E. & B. 48; s. c. 24 Eng. L. & Eq. 103.

³ *Sheldon v. Atlantic Fire and Mar. Ins. Co.*, 26 N. Y. 460; *Ins. Co. of Penn. v. Smith*, 3 Whart. (Penn.) 520; *Baker v. Union Mut. Life Ins. Co.*, 43 N. Y. 283, reversing s. c. 6 Robt. 393; *Bergson v. Builders' Ins. Co.*, 38 Cal. 541; *Robert v. New England Mut. Life Ins. Co.*, 2 Disney (Ohio), 106; *Pitt v. Berkshire Life Ins. Co.*, 100 Mass. 500; *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 20.

⁴ *Prov. Life Ins. Co. v. Fennell*, 49 Ill. 180.

⁵ *Williams v. Cheney*, 3 Gray (Mass.), 215.

⁶ *Murphy v. Mut. Ben. Life Ins. Co.*, 6 La. An. 518.

⁷ *Leg. Int.* vol. v. p. 232, July 18, 1873.

mitted to testify that the policy was issued in the belief that the statements in the application were true, and that no policy would have been issued had the company had any reason to believe that the representations and answers were in any respect false. It is to be presumed that a policy is issued upon the facts stated in the application; and how far false statements, if any there are in the application, affect the validity of the contract, is a question of law for the court, and not one to be settled by the opinion or judgment of either party.

§ 584. **Evidence — Intentional Suicide.** — A man's religious belief or unbelief affords no ground upon which to infer whether he intentionally commits suicide or not, and cannot be put in evidence.¹

§ 585. **Pleading.** — The rules of pleading, as well as of evidence, are the same in their application to the contract of insurance as to other contracts, though these are to a greater extent modified by local laws. These modifications it is not proposed to state. Nor is it proposed to consider the subject of pleading generally, but only to state some general rules of such frequent occurrence in practice as to make a statement here specially convenient.

§ 586. **General Statement of Plaintiff's Case.** — In declaring upon a contract of insurance, it, or so much of it as will show a right to recover, must be set out in terms or in substance. The rule that obtains in declaring upon a penal bond at common law, where the plaintiff may simply count on the bond, and leave the defendant to set up the condition and plead performance, does not obtain here. But, as in cases of insurance, the money is only recoverable on the performance of certain acts by the insured, and the existence of certain facts, the performance of these acts and the existence of these facts must be alleged. But this applies only to conditions and facts precedent. Conditions subsequent to the right of recovery, and all acts to be done by the insurers in discharge of their liability may be omitted from the declaration, and left for the insurers to set up in defence.² And upon the same principle

¹ Gibson v. Am. Mut. Life Ins. Co., 37 N. Y. 80.

² Rockford Ins. Co. v. Nelson, Sup. Ct. Ill., 2 Ins. L. J. 341; Campbell v. Am.

it has been held that a covenant that the capital stock and funds of the company should be subject and liable to make good, and should be applied to pay and make good, all such losses and damages as might happen to the subject-matter of insurance within a certain amount, and that the capital stock and funds of the company should alone be liable, is an absolute covenant on the part of the company to pay the sum insured when a loss should happen; and it is not necessary to aver in the declaration the sufficiency of the capital stock and funds, that being a matter to be pleaded by the insurers, if a defence at all.¹

§ 587. **Special Allegations — Interest — Survivorship — Value — Compliance with Statute Requirements — Negative Allegations.** — The plaintiff must aver an insurable interest, or, if he has not that, the grounds upon which he rests his right to sue.² In *Gilbert v. National Insurance Company*,³ it was held that as the statement in the policy that the insured premises were the property of the plaintiff did not amount to a warranty, the declaration need not aver such ownership.⁴ Where the purchaser or assignee of the "subject insured" is by the terms of the policy entitled to sue, his declaration should show that he has the whole interest. To allege that he has an interest is not sufficient.⁵ An allegation by the plaintiff that "his" store was consumed is a sufficient allegation of ownership after verdict; and an omission to allege the value of the property lost cannot be objected to after verdict;⁶ otherwise on demurrer.⁷ An allegation that the defendant "insured the

Pop. Life Ins. Co., 4 Am. Law Times (U. S. Court Reports), 6; s. c. 1 Bigelow's Life and Accident Ins. Cases, 16; *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381.

¹ *Sunderland Mar. Ins. Co. v. Kearney et al.*, 6 Eng. L. & Eq. 312.

² *Freeman v. Fulton Ins. Co.*, 38 Barb. (N. Y.) 247.

³ 12 Irish Law, 143.

⁴ But see *contra*, *Illinois Mut. Fire Ins. Co. v. Marseilles Manufacturing Co.*, 1 Gilm. (Ill.) 236.

⁵ *Granger v. Howard Ins. Co.*, 5 Wend. (N. Y.) 200.

⁶ *Lane v. Maine Mut. Fire Ins. Co.*, 12 Me. 44; *Ins. Co. v. Seitz*, 4 W. & S. (Penn.) 273; *New Hampshire Mut. Fire Ins. Co. v. Walker*, 10 Fost. (N. H.) 324; *Howard Fire Ins. Co. v. Cormick*, 24 Ill. 455.

⁷ *Ibid.*; *Fowler v. New York Ind. Ins. Co.*, 26 N. Y. 422, reversing s. c. 23 Barb. (N. Y.) 143.

plaintiff to the amount of three thousand dollars on ten thousand bushels of oats," sufficiently states an insurable interest.¹ The plaintiff need not allege that the defendants — a foreign insurance company — have complied with the statutes giving them authority to transact business within the jurisdiction.² And in an action by a foreign insurance company, non-compliance will not be presumed, but must be set up in defence.³ The plaintiff need not aver the truth of statements contained in the application,⁴ nor the performance of conditions subsequent,⁵ nor negative prohibited acts,⁶ or that he is within the excepted risks.

§ 588. **Matters in Defence — Breach of Warranty — Misrepresentation — Other Insurance — False Swearing — Fraud.** — Matters in defence cannot be availed of unless pleaded.⁷ In setting forth the grounds of defence it is not enough merely to negative the truth of a declaration in the application made by the insured. The particulars in which its untruthfulness consists should be set out as far as can reasonably be done, that the plaintiff may have some notice of what he is to meet. Thus, where the plaintiff in his application stated that he had not had symptoms of gout, "or any other complaint," the plea that he had had symptoms of disease of the stomach was held insufficient, as too vague; and it was said that while the court would not tie the defendant down very strictly at the trial, he must honestly do his best to furnish particulars. The particular symptoms should be stated.⁸ So where misrepresentation of title or breach of warranty is alleged, facts from which the

¹ *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520.

² *Fitzsimmons v. City Fire Ins. Co.*, 18 Wis. 234.

³ *Williams v. Cheney*, 3 Gray (Mass.), 215.

⁴ *Herron v. Peoria Mar. and Fire Ins. Co.*, 28 Ill. 255.

⁵ *Ketchum v. Prot. Ins. Co.*, 1 Allen (N. B.), 136.

⁶ *Hunt v. Hudson River Fire Ins. Co.*, 2 Duer (N. Y. Superior Ct.), 481; *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 20.

⁷ *Haskins v. Hamilton Mut. Ins. Co.*, 5 Gray (Mass.), 432; *New York Central Ins. Co. v. Nat. Prot. Ins. Co.*, 20 Barb. (N. Y.) 468; *Sussex County Mut. Ins. Co. v. Woodruff*, 2 Dutch. (N. J.) 541; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9; *Cassacia v. Phoenix Ins. Co.*, 28 Cal. 628; *Devendorf v. Beardsley*, 23 Barb. (N. Y.) 656.

⁸ *Marshall v. Emperor Life Ass. Co.*, Law Reports (1 Q. B.), 35.

court can see that there is misrepresentation or breach of warranty must be stated.¹ So a plea of a defective fireplace should show in what the defect consisted, and that it was material to the risk.² A plea of other insurance should state the particulars.³ If fraud is alleged in defence, it should show that the fraud was committed by the plaintiff or some party in interest,⁴ and in what particulars.⁵ A plea of false swearing in a statement of loss must show where, and before whom, the oath was taken, and in what particulars it is false.⁶

§ 689. **Bankruptcy and Insolvency — Conflict of Laws.** — An insurance company is a “business or commercial corporation” within the meaning of the bankrupt laws of the United States, and if it commits acts of bankruptcy, may be declared bankrupt like a natural person.⁷ This case gave rise to an interesting question of jurisdiction. After the act of bankruptcy, the company was declared insolvent under the insolvent laws of Massachusetts, under proceedings in the courts of that State, enjoined from further doing business, and at a subsequent date a receiver was appointed, and the corporation itself adjudged and decreed to be dissolved. On a petition in bankruptcy subsequently, it was claimed that the corporation was defunct, and could not answer or be dealt with. But the court held that the insolvent laws of Massachusetts were suspended, after the passage of the bankrupt law, as to all matters to which the latter applied, and therefore the proceedings in insolvency in the courts of Massachusetts were ineffectual and nugatory; and that, irrespective of those statutes, or of some other statute authority, the courts of Massachusetts had no more right to annul the existence of the corporation than they

¹ *Ken. and Lou. Mut. Ins. Co. v. Southard*, 8 B. Mon. (Ky.) 634; *Merch. and Manuf. Mut. Ins. Co. v. Wash. Mut. Ins. Co.*, 1 Handy (Ohio), 408.

² *Ibid.*

³ *Ramsay Woollen Cloth Manufacturing Co. v. Mut. Fire Ins. Co.*, 11 Upper Canada (Q. B.), 516.

⁴ *Ferris v. North American Fire Ins. Co.*, 1 Hill (N. Y.), 71.

⁵ *Ibid.*; *Sterling v. Mercantile Mut. Ins. Co.*, 32 Penn. St. 75.

⁶ *Ketchum v. Prot. Ins. Co.*, 1 Allen (N. B.), 136.

⁷ *Reed v. Independent Ins. Co.*, Cir. Ct. U. S. Mass. Dist., 1872, *Shepley, J.*, 1 Ins. L. J. 735.

would have to take the life of a natural person.¹ A mutual life insurance company was also held to be a "business" corporation within the meaning of that act in the United States District Court for the Southern District of New York.²

§ 590. *Bankruptcy — Status of the Company.* — After adjudication of bankruptcy the court has exclusive jurisdiction over the estate and assets of the bankrupt corporation, and is vested with all the power and control previously vested in either the chartered officers of the company or stockholders, or both collectively, over the same, and can make any assessment or call necessary for the collection of the assets as fully as the stockholders or directors could have done. And if the notes given by the stockholders, as and for the capital stock, have not been paid, any balance remaining unpaid may be called in by order of court, notwithstanding, by the terms of the subscription and by the certificate of stock, that balance is to be paid on the call of the directors when ordered by the stockholders. And such call is conclusive as to its amount and propriety, and cannot be questioned in a collateral suit, or in a suit on the note. Nor can the defence of false representation as to the character and prospects of the company be set up as against the assignees who represent the creditors, though that might have been good had it been availed of before the adjudication. Nor can it avail that the directors voted to release the stockholders from the payment of any outstanding balance due on their stock notes, and caused them to be stamped unassessable. Such a vote is inoperative as to creditors and those who insured in the company without knowledge of the fact. And the purchaser of a certificate, who surrenders it and has one issued to himself, succeeds to the rights and the liabilities of the holder of the certificate which he purchased, and of an original stockholder, and the acceptance of a partly unpaid certificate carries with it an implied obligation

¹ The learned judge cited, amongst other cases, *Folger v. Columbian Ins. Co.*, 99 Mass. 267; *Hayward v. Fulcher*, Sir William Jones, 166; *Dean and Chapter of Norwich*, 3 Coke, 75*a*. The real question, however, in this case was whether the insurance company was within the meaning of the Bankrupt Act of 1867.

² *In re Hercules Mut. Life Ass. Soc.*, 1 Ins. L. J. 875.

to pay the balance.¹ In making the call for an assessment it is discretionary with the court whether to give notice, and the stockholders are so far parties to the bankrupt proceedings as to be bound thereby without notice.²

§ 591. **Bankruptcy and Insolvency — Powers and Duties of Assignee and Receivers — Status of Policy-holder.** — The bankruptcy of an insurance company does not release the policyholder from the obligations of his contract; and whatever remains incomplete at the time of the adjudication of bankruptcy passes over to be acted upon by the court which represents the company and succeeds generally to its rights. The assignee has not the original powers of the company. He is an officer of the court and a trustee of the creditors, and cannot waive the performance of conditions, whether limiting time within which action may be brought or otherwise, which the company might have done. And it is his duty, where proofs have been furnished and losses adjusted before adjudication, to revise the same, if he has reason to believe there is any equitable ground for such revision, and he may affirm what appears clearly to have been done or accepted by the company in the way of adjustment or proof of loss. But if that which has been done would not have concluded the company, he can give it no additional force by his affirmance.³ And proof of a claim for loss must be made within the time limited for bringing suit.⁴ Several of the States have passed special statutes relative to the insolvency of insurance companies, differing in particulars, but substantially alike. In New York, the receiver, who is an officer of the court placed in charge of the property, may sue in his own name. In Massachusetts, the corporation is not dissolved merely by the insolvency proceedings, and the receiver sues in the name of the company. In New York, — and the same is doubtless true of other States, — the receiver takes the place of the directors in the settlement of the affairs

¹ *Upton v. Hansbrough*, U. S. Dist. Ct. North. Dist. Ill., Jan. Term, 1873, 5 Chicago Legal News, 242.

² *Ibid.* An elaborate and well-considered case.

³ *In re Fireman's Ins. Co.*, U. S. Dist. Ct. North. Dist. Ill., Jan. 1873, 5 Chicago Legal News, 253.

⁴ *Ibid.*

of the company, under the direction of the court, and all his acts must have the sanction of the court. In making assessments, however, he must show the existence of the same facts and circumstances which would authorize an assessment by the directors if the company were not insolvent. He derives no additional powers from the fact of insolvency, and can maintain suits and recover thereon only as the directors might have done.¹ As we have just seen that in bankruptcy the assignees have not the full discretionary powers of the directors, so in insolvency the receiver, being a trustee, has no right to waive proofs of loss, and, upon the same grounds, doubtless no right to waive the Statute of Limitations.² An assignment by the act of the parties clothes the assignee with no powers not rightfully given by the deed of assignment; and this does not include the power to make assessments, and the like powers held by the corporation. Such powers are not transferable.³

§ 592. **Bankruptcy and Insolvency — Set-off.** — In general, a set-off of a liquidated debt due the corporation is allowable against an unliquidated debt due from them; and this extends to all mutual credits arising, *ex contractu*, between the original parties.⁴ When an insurance company becomes insolvent, the court will sustain the claim of holders of a policy under which they are entitled to recover for a loss, to have a note given by them prior to the insolvency, and purchased by the insurance company, applied in part payment of the loss, although the note has been sold, if the sale be subsequent to the insolvency and to the happening of the loss.⁵ So where the insurance company had loaned money directly to the assured, who afterwards sustained a loss, it was held that the loan might be set off in

¹ *Savage v. Medbury*, 19 N. Y. 32; *Devendorf v. Beardsley*, 23 Barb. (N. Y.) 656; *Thomas v. Whallon*, 31 Barb. (N. Y.) 172; *Shaughnessy v. Rensselaer Ins. Co.*, 21 Barb. (N. Y.) 605; *Sands v. Hill*, 42 Barb. (N. Y.) 651; *Furness v. Sherwood*, 3 Sandf. (N. Y. Superior Ct.) 521.

² *Evans v. Trimountain Mut. Fire Ins. Co.*, 9 Allen (Mass.), 329; *In re Fireman's Ins. Co.*, *ubi supra*.

³ *Hurlburt v. Carter*, 21 Barb. (N. Y.) 221.

⁴ *Holbrook v. American Fire Ins. Co.*, 6 Paige (N. Y. Ch.), 220.

⁵ *Commonwealth v. Shoe and Leather Dealers' Fire and Mar. Ins. Co.*, on the Petition of Low et al., Sup. Jud. Ct. Mass., April, 1873, not yet reported.

the adjustment of the claim for the loss.¹ In *Drake v. Rollo, Assignee*,² it was held that where a person borrowed money of an insurance company, payable partly in three and partly in five years, and before the payment the company became insolvent and was adjudicated a bankrupt, he can, under the twentieth section of the bankrupt law, providing that mutual debts and credits may be set off, set off the debt for claims he has for loss on policies against the company, though the effect would be to give him a preference over other creditors. The rights of the parties are to be determined by the state of facts at the time of the loss. And if in such case the money borrowed is not due when the loss becomes payable, and the company is bankrupt and insolvent, the borrower may maintain his bill in equity against the company or its assignee to enforce the set-off. If, however, the claim against the company for loss be procured with full knowledge of their insolvency, though prior to any legal declaration of the fact, it cannot be set off, as this would be a perversion of the statute, for the benefit of one creditor to the prejudice of another, and against its spirit. If a court of equity could not interpose in such a case, though it be not one of the claims excepted from the right of set-off, a person might borrow the whole capital of an insurance company, and on learning of its insolvency, instead of paying the debt might use a part of it in buying up the depreciated claims against the company to the amount of his debt, and keep the rest in his pocket.³

§ 693. Rule as to Set-off when Company is Solvent, different from the Rule when Company is Insolvent. — The right of set-off is affected by the question whether the company is solvent or insolvent. Thus, where the insured still owes an unpaid balance of his subscription or stock note, this balance is a fund in trust for the benefit of creditors, and a claim for loss cannot be set off against it so long as the losses are unpaid in full. In a solvent company, able to pay all its losses, the claims

¹ *Receivers of Globe Ins. Co.*, 2 Edw. (N. Y. Ch.) 625.

² U. S. C. Ct. North. Dist. Ill., 6 Chicago Legal News, 9.

³ *Hitchcock v. Rollo Ass.*, *ibid.*, disapproving *In re The City Bank of Gurney*,

4 Legal News, 81, U. S. Dist. Ct. Cal.; *Smith v. Hill*, 8 Gray (Mass.), 572.

might be deemed mutual, and subject to set-off, each against the other. But insolvency changes the rule.¹ Nor are holders of claims for losses entitled in mutual insurance companies to set off their claims in actions on their premium notes. They must pay those notes to the amount required, and then, if the assets prove insufficient to pay the whole amount of the losses, they can only receive the same percentage of their losses that the other members receive; otherwise, the holder of a claim offsetting the whole, or a portion of it, against the company's claim on his premium note, would receive more than his just proportion of loss.² Nor can a claim for loss assigned to the maker of a premium note be set off in an action on the premium note, except to the amount to which he would be entitled as a dividend on the claim.³ In payment of losses the insurers are entitled to set off all sums due on the premium note, and for the claimant's just proportion of losses up to the time of payment of the loss; or, if the company is trusted up to the time of the service of process.⁴

¹ *Scammon v. Kimball Ass.*, U. S. C. Ct. North. Dist. Ill., 6 Chicago Legal News, 1.

² *Lawrence v. Nelson*, 4 Bosw. (N. Y. Superior Ct.) 240; s. c. affirmed, 21 N. Y. 158; *Hillier v. Alleghany County Mut. Ins. Co.*, 3 Penn. St. 470. And see also *Lawrence v. McCready*, 6 Bosw. (N. Y.) 329.

³ *Long v. Penn. Ins. Co.*, 6 Penn. St. 421.

⁴ *Swamscott Mach. Co. v. Partridge*, 5 Fost. (N. H.) 369; *Nevins v. Rock Fire Ins. Co.*, ib. 22.

APPENDIX.

THE following act, providing for a standard form of policy, was passed by the legislature of Massachusetts, at its regular session next after the great fire in Boston.

[CHAP. 331, STAT. 1873.]

AN ACT to establish a Standard Form for Insurance Policies.

Be it enacted, &c., as follows :

SECT. 1. Any insurance company authorized to issue policies in this Commonwealth may print upon their policies the words "Massachusetts Standard Policy," provided that the printed parts of such policies are in the following form and language, and that all other provisions of said policies, except as provided in section two, are in writing :—

The eration of of	Insurance Company, of dollars, insures dollars, on	in consid- to the amount 	Premium. Amount insured. Property insured. Property not cov- ered by policy.
Bills of exchange, notes, accounts, evidences and securi- ties of property of every kind, books, wearing apparel, plate, money, jewels, musical instruments, medals, paintings, sculpture, and curi- osities are not included in said insured property, unless specially mentioned.			
Said property is insured for the	term of	begin- ning on the	Term.
day of	in the year one thou- sand eight hundred and	at noon, and continuing until the day of	
in the year one thousand eight hundred and	at	noon, against all loss or damage by <i>fire</i> , originating in any cause except invasion, foreign enemies, civil commotions, riots, or any military or usurped power whatever; the amount of said loss or damage to be estimated according to the actual value of the insured prop- erty at the time when such loss or damage happens, but not to include loss or damage caused by explosions of any kind, unless fire ensues, and then to include that caused by fire only.	
This policy shall be <i>void</i> if any material fact or circum- stance stated in writing has not been fairly represented by the			Perils insured against. Matters avoiding policy.

insured, — or if the insured now has or shall hereafter make any other insurance on the said property without the written assent of the company, — or if, without such assent, the said property shall be removed, unless such removal shall be necessary for its preservation from fire, — or if, without such assent, the situation or circumstances affecting the risk shall, by or with the advice; agency, or consent of the insured, be so altered as to cause an increase of such risk, the non-occupancy of the premises insured, or containing the property insured, not being deemed, however, to cause such increase, — or if, without such assent, the said property shall be sold, or this policy assigned, — or if the insured shall make any attempt to defraud the company, — or if gunpowder or other articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law, — or if camphene, benzine, naphtha, or other chemical oils or burning fluids shall be used by the insured on the premises insured, except that what is known as refined petroleum, kerosene, or coal oil, may be used in stores or dwellings for lighting.

Assured to protect property in case of exposure to fire.

If the insured property shall be exposed to loss or damage by fire, the insured shall make all reasonable exertions to save and protect the same.

Statement by insured in case of loss.

In case of any loss or damage under this policy, a *statement* in writing, signed and sworn to by the insured, shall be forthwith rendered to the company, setting forth the value of the property insured, the interest of the insured therein, all other insurance thereon, the purposes for which and the persons by whom the building insured, or containing the property insured, was used, and the time at which and manner in which the fire originated, so far as known to the insured. The company may also examine the books of account and vouchers of the insured, and make extracts from the same.

Payment of loss to be made within 60 days after proof, unless company elects to replace or repair.

In case of any loss or damage, the company, within sixty days after the insured shall have submitted a statement, as provided in the preceding clause, shall either pay the amount for which it shall be liable, or replace the property with other of the same kind and goodness, — or it may, within fifteen days after such statement is submitted, notify the insured of its intention to rebuild or repair the premises, and shall thereupon enter upon said premises and proceed to rebuild or repair the same with reasonable expedition. It is moreover understood that there can be no abandonment of the property insured to the company, and that the company shall not in any case be liable for more than the sum insured, with interest thereon from the time when the loss shall become payable, as above provided.

Apportionment of loss in case of other insurance.

If there shall be any *other insurance* on the property insured, whether prior or subsequent, the insured shall recover on this policy no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured

thereon. And whenever the company shall pay any loss, the insured shall assign to it, to the extent of the amount so paid, all rights to recover satisfaction for the loss or damage from any person, town, or other corporation, excepting other insurers; or the insured, if requested, shall prosecute therefor at the charge and for the account of the company.

Insured to assign to company claims against third parties.

This policy may be *cancelled* at any time at the request of the insured, who shall thereupon be entitled to a return of the portion of the above premium remaining, after deducting the customary monthly short rates for the time this policy shall have been in force. The company also reserves the right, after giving written notice to the insured, and tendering to the insured a ratable proportion of the premium, to cancel this policy as to all risks subsequent to the expiration of ten days from such notice.

Cancellation of policy.

If this policy shall be made payable to a mortgagee, no act or default of the insured shall affect such mortgagee's right to recover in case of loss: *provided*, that he shall, on demand, pay according to the established scale of rates for any increase of risks not paid for by the insured, and shall, if the company shall elect upon the happening of a loss to pay him the whole amount secured by this mortgage, assign to the company, upon such payment, his said mortgage, together with the note and debt thereby secured, and all other securities held by him as collateral for the same.

Rights of parties in case the policy is made payable to a mortgagee.

In case any difference of opinion shall arise as to the rights of the parties under this policy, the subject thereof shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third being selected by the two so chosen, and the decision of a majority of said referees shall be final and binding on the parties.

Differences to be submitted to referees.

In witness whereof, the said company has caused this policy to be signed by its president and countersigned by its secretary, this _____ day of _____ in the year one thousand eight hundred and _____

President.
Secretary.

SECT. 2. The provisions of the preceding section shall not prevent any company from printing on or in any policy so to be designated as "Massachusetts Standard Policy," the name, location, and date of incorporation of the company, the amount of its capital stock, the names of its officers and agents, and the number and date of the policy; and shall not prevent the use of printed forms of description and specification of the property insured under said policies; nor, in case any such policy is issued through any agent of such company, shall said provisions prevent the company from printing on or in any policy the following words: "This policy shall not be valid until countersigned by the duly authorized agent of the company at _____."

SECT. 3. Any insurance company, and any agent of any insurance company, or any person soliciting insurance, who shall issue any policy of insurance not conforming to the provisions of this act, which shall contain on or in such policy the words "Massachusetts Standard Policy" or any other similar designation, shall for each offence forfeit and pay to the use of the Commonwealth one thousand dollars, to be sued for and recovered with costs, in the name of the Commonwealth, in an action of tort.

SECT. 4. Any insurance company, and any agent of such company or other person soliciting insurance, who shall after July first, eighteen hundred and seventy-three, issue or deliver any policy of insurance against loss or damage by fire, differing as to any of its printed words from the form set forth in this act, shall first file with the insurance commissioner a copy of the printed form of contract or policy intended to be thereafter used and issued by said company, agent, or person in this Commonwealth, and thereafter, in case of any change in such printed form, a statement thereof shall also be filed with the insurance commissioner prior to the use of a form containing such change in printed words; and any company, agent, or person failing or refusing to comply with the provisions of this section, may be enjoined, on complaint of the insurance commissioner, from issuing any more policies of insurance in this Commonwealth. And, upon a request made by the secretary of any incorporated board of trade, chamber of commerce, or corn exchange, said insurance companies, agents, or persons shall furnish them, through the insurance commissioner, with copies of the printed forms of policy used or issued by them respectively in this Commonwealth, and of all changes made in such forms as above provided.

SECT. 5. It shall be the duty of the insurance commissioner to keep such forms of contract or policy of insurance, and changes therein, in a book provided for such purpose, and also to examine such forms, and to note in said book, in a convenient manner for reference, the material variations of such forms from the form set forth in this act, which book shall be open to the inspection of the public, at the office of the insurance commissioner. Said insurance commissioner shall furnish a copy of such variations to any person applying for the same, and may charge a fee not exceeding one dollar for each such service; *provided*, such service shall be performed in his individual capacity, and that the Commonwealth shall not assume any responsibility therefor.

SECT. 6. Any policy of insurance issued or delivered in this Commonwealth in violation of any of the provisions of this act, shall nevertheless be binding upon the company issuing the same. [*Approved June 3, 1873.*]

Form of policy adopted by the Massachusetts Mutual Insurance Company on reorganization after the great fire in Boston, Nov. 9, 1872. It will be observed that no application is referred to in the policy, and no formal application is required.

No.

MASSACHUSETTS MUTUAL INSURANCE COMPANY.

CASH GUARANTEE CAPITAL, \$200,000.

THIS POLICY OF INSURANCE WITNESSETH, that whereas of
in the county of and State of a member of the
MASSACHUSETTS MUTUAL INSURANCE COMPANY, incorporated Dec. 21,
A.D. 1872, paid the sum of dollars as premium and deposit
money; and also bound and obliged heirs, executors, administrators,
and assigns to pay, in addition to said premium and deposit, all such sum
or sums as may be assessed by the directors of said company, pursuant to
the laws of the State of Massachusetts, but not in any event to exceed the
amount of said premium and deposit, as per margin.

IN CONSIDERATION OF THE PREMISES, the said heirs, executors,
and administrators, are hereby insured against loss or damage by fire or
lightning, under the conditions and limitations hereinafter expressed, the
sum of dollars

situated in in the State of occupied for In case of
loss payable to The risk commencing with the date of this policy, at
noon, and terminating on the first day of at noon, in the year one
thousand eight hundred and seventy- being five years from the first
day of the month in which this policy is dated; provided always, that in
case the said insured shall have made, or shall hereafter make, any other
insurance against fire or lightning, whether valid or void, upon the property
hereby insured, or any part thereof, without the consent of this company
expressed in this policy, then this insurance shall be void. And the insured,
having other insurance (with such consent) either valid or void, upon the
property hereby insured, whether prior or subsequent to the date of this
policy, in case of loss caused by fire or lightning, or both, shall not re-
ceive any greater portion of the loss or damage sustained, than the amount
hereby insured shall bear to the whole amount insured on said property
against loss by fire or lightning, or both. And it is further agreed, —

I. That the company have the right of cancelling any policy at any time
when two-thirds of the directors present at any meeting shall deem there
is sufficient cause therefor; in such case the secretary shall give the party
insured, and the party to whom the policy is payable in case of loss, ten
days' notice, in writing, of the determination of the directors to exercise

this right, and the insured, in such case, shall be entitled to a return of his premium and deposit money, less his proportion of the expenses, losses, and reserve.

II. That the proprietor of any policy may surrender the same at any time, with the consent of the party to whom it is payable, and be entitled to a return of his premium and deposit money, as provided in Art. I., subject to a deduction of ten per cent, to be retained for the benefit of the company.

III. That whenever a building hereby insured, or a building containing personal property hereby insured, shall be altered, enlarged, or appropriated to any other purposes than those herein mentioned, or the risk otherwise increased, by the act, or with the knowledge or consent of the insured, without the consent of the president first obtained, in writing, this policy shall be void; but the president may, upon application of the insured, revive the policy upon such terms as he may deem equitable, but, if not revived, the insured shall be entitled to a return of his premium and deposit money, as provided in Art. II.

Ordinary repairs assented to.

IV. That upon the alienation of any property hereby insured, this policy shall thereupon be void, unless payable to a mortgagee; but the purchaser, having this policy legally transferred to him, may, upon application, have the policy revived with the approval of the president expressed in writing; and by such revival the company and such purchaser shall be entitled to all the rights to which the original parties respectively were entitled before such alienation. When the policy is not transferred, the party insured shall be entitled to a return of his premium and deposit money, as provided in Art. II. No estate shall be deemed to be alienated by mortgage, until the foreclosure of such mortgage; and this policy, if payable to a mortgagee, shall continue so payable, until foreclosure, notwithstanding any alienation of the property made subsequent to such mortgage; and such mortgagee shall pay all assessments, provided the insured shall not pay the same on demand.

V. That when a policy is payable in case of loss to a mortgagee, the interest of the mortgagee therein shall not be hazarded by any act or neglect of the mortgagor or owner increasing the hazard of the insurance, provided the mortgagee does not aid or consent thereto, and provided the mortgagee shall, on knowing of any increased risk, notify the company thereof, and pay the additional premium therefor. It is also agreed that if the company pay a mortgagee any loss under this policy, and claim that, as to the mortgagor or owner no liability of the company therefor existed, then the company shall be subrogated to all the rights of the mortgagee under his mortgage and other securities for the mortgage debt, to the extent of the loss so paid by the company to the mortgagee. Or the company may, at its option, pay to the mortgagee the whole principal and interest due on his mortgage, and receive an absolute assignment of the mortgage

and of all other securities held by the mortgagee as collateral to the mortgage debt.

VI. That any member sustaining loss shall notify the secretary in writing, before any repairs are made; and in case of disagreement respecting the amount of damage, the insured and the president shall submit the matter to competent and impartial men, whose award in writing shall be binding on the parties; payment shall be made in sixty days after receiving proof of the loss. Provided always, that the company, either alone, or, in the case of other insurance, with the other insurers, shall have the right to enter upon and rebuild or repair the premises, or replace the property damaged.

VII. That whenever the company shall pay any loss, the insured shall assign over to said company all his rights to recover satisfaction therefor, from any other person or persons, town or other corporation, or to bring suit therefor at the charge and for the account of the said company, if requested.

VIII. That this insurance is not to apply to, or cover, any books of account, bills of exchange, notes, deeds, or evidences or security of property of any kind, books, musical instruments, wearing apparel, plate, money, jewels, medals, paintings, statuary or other curiosities, unless specified in this policy.

NOW BE IT KNOWN, that the absolute and conditional funds of said company are hereby bound and subjected to satisfy and make good unto the said insured, heirs, executors, and administrators, all the damage by fire or lightning which may happen to the property hereby insured (not exceeding in the aggregate the sum hereby insured) within the term aforesaid, according to the true intent and meaning of the conditions of this policy. Provided, nevertheless, that if the whole of the absolute and conditional funds of said company should be insufficient to pay and satisfy all losses that may happen, in such case, a just average shall be made to the sufferers; and the payment to be demanded, in virtue of this policy, shall be such a proportion of said funds as the loss sustained by the party hereby insured bears to the whole amount of losses then remaining unpaid.

IN WITNESS WHEREOF, the MASSACHUSETTS MUTUAL INSURANCE COMPANY have caused this policy to be subscribed by their president, and countersigned by their secretary, at Boston, this day of in the year one thousand eight hundred and seventy- .

President.

Secretary.

Endorsed on this policy is the following notice : —

By virtue of this policy, the assured is hereby notified that he is a member of the MASSACHUSETTS MUTUAL INSURANCE COMPANY, and that the annual meetings of said company are holden at its home office, on the second Tuesday of January, in each year, at 12 o'clock, M.

Form of application for insurance in the New England Mutual Life Insurance Company.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY.

No.

(Every application, whether for the original or an additional insurance, is to be filled out in detail; otherwise it will not receive the consideration of the company.)

This applicant of proposes to insure the life of with the NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, to the amount of dollars, for the period of on the plan, and thereby to become a member of said company; and with that view, and as the basis of such insurance, makes the following statements, which he declares to be warranties, and in all respects true:—

- 1—Place and date of birth—the }
year and month? }
- 2—Residence and address of the }
person whose life is proposed } County of State of
for insurance }
- 3—Single or married?
- 4—Profession or occupation? . .
- 5—Weight?
Height? feet inches.
General state of health? . .
- 6—Whether now, or at any time, }
and when, and how long, and }
under what circumstances, and }
to what degree, subject to, or }
at all affected by, any of the }
following symptoms, diseases, }
or infirmities; or suspected to }
be so, by himself or by any }
medical authority, viz.:— }

Apoplexy; Asthma; Bronchitis; Cancer; Chronic Diarrhœa, or Dysentery; Consumption, Spitting of Blood, or any disease of the Lungs; Convulsions, or Spasms; Coughs, prolonged or habitual; Disease of the Brain, Nervous System, Heart, Stomach, Liver, Bowels, Kidneys, Bladder, Prostate Gland, or of the Generative Organs; Dropsy; Dyspepsia; Epileptic or other Fits or Fainting Turns; Erysipelas; Eruptive Diseases; Fistula (*in ano*), or Piles; Gout, or Rheumatism; Pleurisy; Rupture; Scrofula, or any disease so called; Small Pox, or Varioloid; Tumors; Vertigo, Dizziness, or Giddiness.

- 7 — Has the person *now*, or has he had, any serious illness, disease, or symptoms of disease, not enumerated above, or met with any accident or injury; and if so, of what nature? and when? }
- 8 — Has there ever been a predisposition or tendency to any hereditary disease, insanity, mental derangement, or unsoundness, or imbecility, or to suicide, in the person whose life is proposed for insurance, or in any member of his family, or collateral branches thereof, such as uncles or aunts? }
- 9 — Is the person now, and has he always been, of sound mind? }
- 10 — What are the person's habits in regard to the use of intoxicating liquors or narcotics; and are they correct in every other respect? }
- 11 — Has the person resided out of the United States, or in any part of the United States south of the southern boundary of Virginia, either for health, business, or pleasure? If so, for what purpose, and where, and for what period? }
- 12 — Has any life insurance company declined issuing a policy on the life of the person proposed for insurance, either orally or in writing? }
- 13 — Has any application for a policy, or statement with regard to the health of the person, been presented to any life insurance company, or agent thereof, *in any form whatsoever*, prior to this date? If so, state the particulars. }
- 14 — Has any medical opinion or examination been obtained, or applied for, by himself or others, in behalf of the person whose life is proposed for insurance, for any disease or suspicion thereof, or for life insurance, or for any purpose whatsoever, prior to the present occasion? If so, state the particulars. }

- 15 — If now insured, state in what company or companies, the amount, and for what period in each, and whether at the ordinary or an extra rate of premium }
- 16 — What is the name of the usual medical attendant of the person whose life is proposed for insurance, and the names of any who may have been consulted within five years past? Please state the particulars of the symptoms, diseases, or infirmities prescribed for, or consulted about, and the medical opinion thereon }
- 17 — Age of the parents, if living? } Father, years. Mother, years.
Age attained by grandparents? } P. G. F. ,, P. G. M. ,,
M. G. F. ,, M. G. M. ,,
- 18 — Age of the brothers, and sisters, if living? } Brothers, ,,
Sisters, ,,
- 19 — State of health of the surviving parents, brothers, and sisters? } Father, Mother,
Brothers, Sisters,
- 20 — At what age, and of what disease, have both or either of the parents died? } Father's age, Cause of death,
Mother's ,, ,, ,,
- 21 — At what age, and of what disease, have any of the brothers and sisters died? } Brother's ,, ,, ,,
,, ,, ,, ,,
,, ,, ,, ,,
Sister's ,, ,, ,,
,, ,, ,, ,,
,, ,, ,, ,,
- If deaths in the family record have been ascribed to *childbirth*, state distinctly whether there was any actual or suspected pulmonary disease connected therewith.
- 22 — Name and residence of a disinterested friend, who knows the state of health of the person whose life is proposed for insurance, to be referred to confidentially for information; and whose answers will form a part of this application }
- 23 — Are there any facts or circumstances not herein stated which affect the risk on the proposed life unfavorably? }

- 24 — Does the applicant warrant the truth of all the foregoing answers, and agree that if any answer to the above questions, or in said statement, or any one of them, is fraudulent or untrue, or if there is any concealment of fact bearing upon the proposed risk, whether inquired about or not, or any non-compliance with the terms and conditions of the policy, and the rules of the company, it shall vitiate the insurance, and that, in such cases, no return of premium shall be made? }
- 25 — How are payments of premiums to be made, — annually, semi-annually, or quarterly? . . . }
- 26 — For whose benefit, or on whose behalf, is this application made? *and what is the interest of such person in the life to be assured?* }
- 27 — Has the applicant carefully read the above questions and the answers thereto? }

If the proposed life be a female, she will answer the following additional questions, viz.: —

- Is she single, or married, or soon expecting to be married? }
- If pregnant, how far advanced? . . .
- Is there any reason to apprehend unusual difficulty of labor? }
- Has any former labor been difficult? If so, from what cause? }
- Has she ever been affected, or suspected to be so, either by herself or any medical or other authority, of any disease of the urinary or generative organs? }

The foregoing are full and true answers to the questions proposed.

Dated at on the day of A.D. 187 .

To be signed in presence of the medical examiner, by the person whose life is proposed for insurance. }


To be signed by the }

Applicant. }

Questions to be answered by a friend of the person whose life is proposed for insurance.

1. How long have you known h , and are you on terms of intimacy?
2. Is he now, and has he always been, temperate?
3. Are his habits otherwise correct? Active or sedentary?
4. Has he been afflicted with any mental or physical disease or infirmity, or symptoms thereof, to your knowledge?
5. Had he been so afflicted, would you have been likely to know it?
6. Is he in general good health, and do you esteem him to be equal, as regards expectation of life, to the average of persons of his age who are now in good health?

MEDICAL EXAMINER'S CERTIFICATE.

 Before or after making the physical examination, the medical examiner will put such further inquiries as he may think necessary, respecting the risk, which he may deem worthy the consideration of the company.

Examination of Mr.

- | | |
|---|---------------|
| 1—Have you read each question and answer thereto, of the person appearing for examination? | } <i>Ans.</i> |
| 2—Has he (or she) signed, in your presence, the foregoing application? | } <i>Ans.</i> |
| 3—Does said person now appear to enjoy good health in every respect? | } <i>Ans.</i> |
| 4—What is his or her temperament, complexion, carriage, and general appearance? | } <i>Ans.</i> |
| State— <i>a</i> , <i>Girth of chest</i> (about midway) over the linen, and the degree of expansion on forced inspiration — | } <i>Ans.</i> |
| <i>b</i> , <i>Girth of waist</i> — | <i>Ans.</i> |
| <i>c</i> , <i>Condition of lungs</i> , on examination by percussion and auscultation — | } <i>Ans.</i> |
| <i>d</i> , <i>Character of the respiration</i> ; is it full, easy, regular, and symmetrical? number of inspirations per minute | } <i>Ans.</i> |
| <i>e</i> , <i>Heart</i> —Are its sounds clear, distinct, rhythmic? Are there any indications of disease? | } <i>Ans.</i> |
| <i>f</i> , <i>Liver</i> —Is there any evidence of disease in this organ? | } <i>Ans.</i> |
| <i>g</i> , <i>Condition of abdominal and urinary organs</i> . Any evidence of disease of kidneys? | } <i>Ans.</i> |
| <i>h</i> , <i>Pulse</i> , number per minute, when not unusually accelerated; hard or soft, strong or weak, regular or intermitting? — | } <i>Ans.</i> |
| <i>i</i> , <i>Brain</i> —Are there any indications of disease or impairment of the functions of this organ, or of the nervous system? | } <i>Ans.</i> |

- 5 — Are there any indications of a predisposition, }
 either hereditary or acquired, to any local or } *Ans.*
 constitutional disease? }
- 6 — Is there evidence of successful vaccination? . . } *Ans.*
- 7 — Has the person had any ailments or injury; and }
 if so, will the medical examiner state his opin- } *Ans.*
 ion of *their value as affecting the risk?* . . . }
- 8 — Are the vital and other organs in a normal con- }
 dition? } *Ans.*
- 9 — Is the person, in your opinion, as good a life }
 for insurance as the average of persons of the } *Ans.*
same age, who are of sound constitution, in
good health, and whose family history is good;
 and do you, acting in the interest of the com-
 pany, advise the acceptance of the risk? . . }

(Please certify to this directly and specifically.)

187 .

M.D.

Form of policy issued by the New England Mutual Life Insurance Company.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY,
 BOSTON.

No.	AGE,
AMOUNT, \$	PREMIUM, \$

THIS POLICY OF INSURANCE WITNESSETH, that the NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, in consideration of the payment of _____ dollars, and _____ cents, this day made by _____ of _____ in the State of _____ being the assured in this policy, and of the punctual payment of a like sum to be made in the same manner to them, at their office in Boston, or to their agent duly authorized, on or before the _____ day of _____ in every year during the continuance of this policy, do promise and agree to pay, at their office in Boston, the amount of _____ dollars, in lawful money of the United States, to the said _____ his executors or administrators, in sixty days after due proof of the death of _____ after deducting therefrom all indebtedness of the party to the company, together with the residuc, if any, of the year's premium.

The only conditions upon which this policy is issued by the company, and accepted by the assured, are the following: —

That the statements and declarations made by, and on behalf of, the insured in the application for this policy, which are hereby referred to as

the basis of this contract and are a part thereof, and on the faith of which it is issued, are in all respects true, and that no fact has been suppressed relating to the health or circumstances of the insured affecting the interests of said company, or their inducement to accept the risk.

The insured may reside in the United States and its Territories (except in localities where yellow fever is prevailing at the time as an epidemic); and in the British Provinces, and travel in and make passages along the coasts thereof; and may go to, return from, reside and travel in Europe, the West Indies (between the months of November and May inclusive), and the islands of the Pacific Ocean.

The insured may, without previous notice to the company, go and remain beyond the above limits; or may engage in any military or naval service; or engage in voyages upon the high seas as an occupation; or in blasting, mining, or submarine operations; or in the production or manufacture of highly inflammable or explosive substances; or in working a steam-engine on land or water as engineer or fireman, or in a similar capacity; or as an employé on any railroad train; but in such case he shall pay for remaining beyond the above limits of residence and travel, or for the risk of military or naval service in time of war, or for either of said occupations, an extra premium, equal to that charged in similar cases by other first-class companies in the United States, which, if not paid at the time of the assumption of the risk, shall not invalidate this contract, but shall be a lien upon the policy.

Any assignment of this policy shall be void unless assented to in writing by said company, but the policy shall not be invalidated thereby.

In case of any indebtedness due to this company from the assured, this policy, and all sums due thereunder, are hereby pledged to secure said indebtedness, and the company shall have a lien therefor on this policy; and said debt or demand may be set off against the amount due thereon.

This policy is payable only at the office of the company in Boston, from which it is issued, and this contract shall be governed and construed by the laws of Massachusetts.

The loss shall be payable in sixty days after satisfactory proof thereof shall have been furnished at the office in Boston, by the sworn certificate of the attending physician, if there were any, and the full and particular statement, under oath, of at least one competent and disinterested witness, stating the time, place, cause, and circumstances of the death of the insured.

No suit shall be brought against the company on any claim under this policy, unless said suit is commenced within two years from the time when the right of action accrues, and also within three years from the termination of the life insured.

This policy shall not take effect until the first premium is actually paid, and agents are not authorized to deliver the policy to the assured until such payment has been made.

General agents appointed directly by the company are alone authorized

to receive premiums at the day when payable, and not afterwards, but cannot give credit, or make, alter, or discharge contracts, or waive forfeitures.

No alteration or waiver of the conditions of this policy shall be valid unless made in writing at the office in Boston, and signed by the president.

All premiums due under this policy shall be paid in advance, but any annual premium may, at the election of the assured, be paid in cash, either in one sum or in semi-annual or quarterly instalments, to be secured by the notes of the assured; it being understood that the company assumes no risk for the period covered by such deferred payments, but only for that portion of the year for which the premium shall have been actually paid IN CASH, in advance; and that in case of loss all such deferred payments are to be deducted from the amount payable.

In case any premium upon this policy, or any part of a premium, or any note given therefor, shall not be paid at the day when payable, the policy shall thereupon become forfeited and void, except as provided by 186th chapter of the acts of the Legislature of Massachusetts, in the year 1861, entitled "An Act to Regulate the Forfeiture of Policies of Life Insurance," and in such cases the holder of the policy shall not be entitled to any return of premium or share of the surplus funds.

This policy shall be void if the insured shall die by his own hand or act, or in, or in consequence of, a duel, or by the hands of justice, or in the violation of, or attempt to violate, any criminal law of the United States, or of any State or country in which the insured may be.

IN WITNESS WHEREOF, the said NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY have, by their president, signed and delivered this contract, this day of in the year one thousand eight hundred and seventy-

President.

Secretary.

This policy is not valid till countersigned by
Countersigned,

*Form of application for insurance in the Travelers Insurance Company,
of Hartford, Conn.*

TRAVELERS INSURANCE COMPANY, OF HARTFORD, CONN.

APPLICATION FOR INSURANCE AGAINST ACCIDENTS.


1. Name in full.	2. Age.	
3. Residence. } Town,	County,	State,
Place of Business } (Street and No.)		

4. Occupations. }
 If more than one, name them all. }
5. To whom payable, in case } Name.
 of death by accident. }
- Give full name, relationship, and }
 residence. } Residence and }
 Relationship. }
6. Have you any other insurance in this company?
 If so, to what amount?
7. Class of risk — preferred, ordinary, medium, haz- }
 ardous, extra hazardous, or special contract. }
8. Death only, indemnity only, or both.
9. Amount insured for } \$
 death by accident. }
10. Weekly indemnity. \$ 11. Term. Months.
 12. Premium. \$
13. *a.* Have you ever had, or are you now suffering from, any }
 disease, especially rheumatism, erysipelas, scrofula, ul- }
 cers, varicose veins, bodily infirmities, or wounds, which }
 would retard recovery from, or be aggravated by, per- }
 sonal injuries? }
- b.* Have you ever had or are you subject to fits, or to any }
 disorders of the brain, or any physical or mental infirm- }
 ity which would thereby render you liable to personal }
 injuries? }
14. Are you aware that you will not be entitled to recover for }
 disability arising from or aggravated by disease, or for }
 the result of accident induced thereby; or for death at- }
 tributable to natural causes? }
15. Have you in contemplation any special journey, or haz- }
 ardous undertaking, not disclosed in this application for }
 insurance? }
16. Are your habits of life correct and temperate, and do you }
 understand that the policy will not cover any accident or }
 injury caused by, or resulting from, intoxicating drinks, }
 or happening while under the influence thereof? }
17. Has your attention been called to the classification of risks, }
 and the fact that you will not be entitled to recover for }
 any injury received by exposure to accidents or risks }
 classified as more hazardous than the occupations or haz- }
 ards against which you hereby elect to insure? }

DECLARATION: I, _____ being desirous of effecting an insurance with the TRAVELERS INSURANCE COMPANY, do warrant the above statements to be true; and I hereby agree that this declaration and warranty shall be the basis of the contract between me and the said company, and that the policy hereby applied for is accepted, subject to all the conditions, classifications, and provisions contained or referred to therein.

Dated at _____ this _____ day of _____ 187 .

Signed,

 *Rates and classification in all cases to conform to latest edition of Manual.*

Form of policy against accident issued by the Travelers Insurance Company, of Hartford, Conn.

GENERAL ACCIDENTS.

THE TRAVELERS INSURANCE COMPANY, OF HARTFORD, CONN.

AMOUNT, \$

PREMIUM, \$

IN CONSIDERATION OF the representations made in the application for this insurance, and of the sum of dollars, does hereby insure by occupation, profession, or employment, a residing in county of and State of in the principal sum of dollars, for the term of months, ending on the day of eighteen hundred and at twelve o'clock noon. The said sum insured to be paid to or legal representatives, within ninety days after sufficient proof that the insured, at any time within the continuance of this policy, shall have sustained bodily injuries, effected through *external, violent, and accidental means*, within the intent and meaning of this contract and the conditions hereunto annexed, and such injuries alone shall have occasioned death within ninety days from the happening thereof; or, if the insured shall sustain bodily injuries, by means as aforesaid, which shall, independently of all other causes, immediately and wholly disable and prevent him from the prosecution of any and every kind of business; then, on satisfactory proof of such injuries, he shall be indemnified against loss of time thereby, in a sum not exceeding dollars per week, for such period of continuous total disability as shall immediately follow the accident and injuries as aforesaid; not exceeding, however, twenty-six consecutive weeks from the time of the happening of such accident.

PROVIDED ALWAYS, that this policy is issued and accepted subject to all the provisions, conditions, limitations, and exceptions herein contained or referred to, and upon the express agreement that the statements and declarations of the insured, in his application for this insurance, are warranted to be true in all respects, and that said application, together with the company's classification of hazards indorsed hereon, is referred to and made a part of this contract; and that if this policy, or any renewal thereof, has been, or shall be, obtained through misrepresentation, fraud, or concealment, or if any attempt shall be made by false swearing, or suppression of any material fact, on the part of the insured, to obtain any sum under this policy, or any renewal thereof, then the same shall be absolutely void.


PROVIDED ALWAYS, that this insurance shall not extend to any bodily injury of which there shall be no external and visible sign; nor to any bodily injury, happening directly or indirectly in consequence of disease; nor to any death or disability which may have been caused wholly or in part

by bodily infirmities or disease existing prior or subsequent to the date of this contract, or by the taking of poison, or by any surgical operation or medical or mechanical treatment for disease; nor to any case except where the injury aforesaid is the proximate and sole cause of the disability or death. And no claim shall be made under this policy when the death or injury may have been caused by duelling, fighting, wrestling, lifting, or by over-exertion, or by suicide (felonious or otherwise, sane or insane), or by sun-stroke, freezing, or self-inflicted injuries, or by concealed weapons carried by the insured, or when the death or injury may have happened in consequence of war, riot, or invasion, or of riding or driving races, or of exposure to any obvious or unnecessary danger, hazard, or perilous adventure, or of violating the rules of any company or corporation, or when the death or injury may have happened while the insured was, or in consequence of his having been, under the influence of intoxicating drinks, or taking part in gymnastic sports, or while employed in mining, blasting, or wrecking, or in the manufacture, transportation, or use of gunpowder or other explosive substances, or while engaged in, or in consequence of, any unlawful act. And this insurance shall not be held to extend to mysterious disappearances, nor to any case of death or disability, the nature, cause, or manner of which is unknown, or incapable of direct and positive proof.

PROVIDED ALWAYS, that if the insured shall travel or be beyond or without the limits of travel and residence hereinafter prescribed, without first obtaining from this company, or one of its agents, a special permit in writing, and paying the extra premium therefor, then this policy shall be wholly void as to all accidents occurring beyond such limits. No indemnity shall be paid for loss of time resulting from accident occurring while the insured is without or beyond such limits. Said limits of travel and residence are as follows, viz.: The inhabited portions of civilized abodes of the States of the United States, the Dominion of Canada, and Prince Edward's Island, and coastwise by regular lines of passenger or mail conveyance from port to port on the Atlantic seaboard or Gulf of Mexico; but in no event to include any voyage past or around Cape Hatteras, or upon the high seas, without special permit and extra premium therefor. *Provided, however,* that the insured may travel to California, or return, in the cars of the Pacific Railroad, without permit, the insurance being limited during said journey to such fatal or non-fatal injuries as may be received while actually riding in railway coaches provided for the transportation of passengers. No insurance is granted under this contract against any fatal or non-fatal injuries caused by Indians.

PROVIDED ALWAYS, that all sums which may be paid by way of indemnity to the insured, by virtue of this policy, shall be accounted in diminution of the principal sum hereby insured, so that in case of subsequent death or injury, during the continuance of this policy, and the year in which such indemnity may have been paid, the total amount to be paid by the said company shall not in any case exceed the principal sum hereby insured.

Claims under this policy are payable only at the company's office in Hartford, and this policy is subject also to the following conditions:—

1. The party insured is required to use all due diligence for personal safety and protection, and to notify the secretary of this company immediately, and in writing, of any change from the occupation, profession, or employment under which this insurance is granted. He is insured under classification as indorsed hereon, the same being a part of this contract, and this policy shall be wholly void as to all accidents occurring in any occupation, profession, employment, or exposure not named, incident to or included in the classification under which he is insured, unless he shall have first procured from this company or one of its agents, a written permit therefor, and paid the additional premium required.  Standing, riding, or being upon the platforms of moving railway coaches, other than street cars, or riding in any other place not provided for the transportation of passengers, or entering or attempting to enter or leave any public conveyance using steam as motive power, while the same is in motion, are hazards not contemplated or covered by this contract; and no sum will be paid for loss of life or disability (in consequence of such exposures) happening to any person, other than employes on such conveyances, who shall have given notice of such occupation, and paid the fixed premium for such hazards.

2. In the event of any accident or injury for which claim may be made under this policy, or, in case of death resulting therefrom, immediate notice shall be given in writing, addressed to the secretary of this company, at Hartford, Conn., stating the full name, occupation, and address of the insured, with full particulars of the accident and injury; and failure to give such immediate written notice shall invalidate all claims under this policy; and unless direct and affirmative proof of the same, and of the death or duration of total disability shall be furnished to the company within seven months from the happening of such accident, then all claims accruing under this policy shall be waived and forfeited to the company.

3. No suit or proceeding at law or in equity shall be brought to recover any sum hereby insured, unless the same is commenced within one year from the time the right of action accrues.

4. The insured shall not be entitled to indemnity for disabling injuries beyond the amount of his ordinary wages, salary, or the money value of his time during the period of continuous total disability, not exceeding twenty-six weeks as aforesaid.

5. No claim shall be payable under this policy, unless any medical adviser of the company shall be allowed to examine the person of the insured, in respect to any alleged injury or cause of death, when and so often as may be reasonably required on behalf of the company.

6. The risk taken by this company on any one life is limited to ten thousand dollars and fifty dollars weekly indemnity: and no insurance, whether effected by the company's life or accident policies, or tickets,

shall hold good as to the surplus insured above those amounts, respectively.

7. No assignment of this policy shall be valid unless made in writing, indorsed hereon, and unless a copy of such assignment shall be given to this company within thirty days after its execution; and any claim under this policy made by any assignee shall be subject to proof of interest.

8. If the company shall so elect, this policy may be cancelled at any time, by refunding to the insured the premium paid by him, less a *pro rata* part thereof for the time said policy has been in force.

9. The *actual payment of premium*, before the happening of any accident under which claim for loss may be made, as well as all the provisions and conditions aforesaid, and a strict compliance therewith during the continuance of this policy, are conditions precedent to the making of this contract, and no waiver shall be claimed by reason of the act or acts of any local agent, unless such act or waiver be specially authorized in writing, over the signature of the president or secretary of this company.

10. This policy is issued only upon the express condition that the person or persons, if any other than the insured, who have procured this insurance to be taken by this company, shall be deemed the agent or agents of the *insured*, and *not of this company*, in any transactions relating to this insurance, and if the premium on this policy shall be paid to any person or persons other than the duly commissioned agent of this company, such payment shall be at the sole risk of the insured.

IN WITNESS WHEREOF, the TRAVELERS' INSURANCE COMPANY, of Hartford, has caused these presents to be signed by its president, and attested by its secretary, and delivered at the home office, in the city of Hartford, State of Connecticut, and this policy countersigned by _____ agent of this company, at

Attest:

President.

Secretary.

Countersigned at
day of

this }
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Agent.

CLASSIFICATION REFERRED TO IN THE POLICY.

[See Condition No. 1.]

Classification preferred, includes the following named occupations, professions, and employments: Actuary, Apothecary, Artist, painter, Attorney, lawyer, Auditor, Army or Navy Officer, not in service, Author, writer, Bank Officer or Clerk, Barber, Book-keeper, accountant, Book seller, Broker, in merchandise, stocks, or gold, Copyist, Clergyman, minister, Clerk, generally, Clothier, Commission Merchant, Dressmaker, Draughtsman, Druggist, Editor, reporter, Express agent, office duty, Grocer, Hotel Keeper, propri-

etor, Insurance Officer or Clerk, not travelling, Lithographer, not working, Manufacturer, not working, Milliner, Musician, not travelling, Physician, surgeon, Postmaster, P. O. Clerk, Paymaster, office, Phonographer, Photographer, Publisher, President or Secretary of Corporation, Schoolmaster, Tailor, merchant, Teacher, Telegraph Operator, Ticket Agent, at office, Wig Maker.

Classification ordinary, includes the occupations, professions, and employments named under classification preferred, and also the following named: Actor, Actress, Agricultural Implement Maker, not using circular saw, Ale or Beer Manufacturer, Architect, Armorer, Artificial Limb Maker, Baker, Barber on Steamboat, Basket Maker, Brick Maker, Bell Hanger, Boat Builder, Book Binder, Boot and Shoe Maker, Box and Trunk Maker, Brass Polisher, finisher, Brewer, Builder, Cabinet Maker, not using circular saw, Cap or Carpet Bag Maker, Carpet Weaver, Carriage Maker, Chair Maker, Chief Engineer, Civil Engineer, Clerk on River Steamboat, Clock Maker, Coach Maker, Coffee House Keeper, Commercial Agent, Compositor, Confectioner, Cook, professional, Coppersmith, Copperplate Printer, Chiropodist, Cornice Moulder, Cotton Packer and Presser, Cotton Dyer, Cotton Printer, Currier, Custom House Officer, inspector, &c., Cutler, Die Engraver, mould maker, Distiller, rectifier, Drug Grinder, Eating House Keeper, Electrotypier, Embosser, Embroiderer, Engineer of Stationary Engine, Engraver, Farmer, not working, File Maker, Fish Curer, Fish and Oyster Dealer, Furrer, Gardener, Gas Fitter, Gas Works, service, Ganger, Glazier, Glover, Gold Beater, Gold or Silver Refiner and Worker, Grain Measurer, Grave Digger, Gunsmith, Harness Maker, Hat and Cap Maker, Hollow Ware Maker, Hoop Maker, Hotel or Tavern Keeper, country, Horse Car Conductor, House Decorator, India Rubber Manufactory, employé in, Ink Maker, Instrument Case Maker, not using circular saw, Japanner, Jeweller, working, Leather Dyer, Lithographer, working, Locksmith, Looking Glass Maker, Machinist, Master Mason, Marble Cutter, Medical Student, Marketman, Master Mechanic, Metal Refiner, Miller, grain and flour, Milkman, Mould Maker, Musician, travelling, Nail Maker, Naval Architect, Nurseryman, working, Operator in Cotton or Woollen Mill, Organ Builder, Oyster Dealer, Packer of Hay, cotton, pork, or beef, Packing Case Maker, not using circular saw, Paper Hanger, Paper Box Maker, Pastry Cook, Pavior, Pawnbroker, Paymaster, travelling, Peddler, Pencil Maker, Picture Frame Maker, Plasterer, Plater, Plumber, Porter, Pressman, Printer, Pump Maker, Rectifier, Rope Maker, Saddler, Sail Maker, Saloon Keeper, Sausage Maker, Scourer, dyer, Segar Maker, Sheriff or Deputy, Ship Broker, agent, Ship Builder, contractor, Ship Inspector, Shovel Maker, Silversmith, Spectacle Maker, Spindle Maker, Spinner, Spring Maker, Steel Pen Maker, Stereotypier, Steward on River Steamer, low pressure, Stone Cutter and Dresser, Surgical Instrument Maker, Surveyor, Superintendent, railroad, Tailor, working, Tallow Chandler, Tanner, Tinman, Travelling Agent, Tool Maker, Type Founder, Umbrella Maker, Upholsterer, Wagon Maker, Warehouseman,

Watchmaker, working, Weaver, Weigher, gauger, Weighing Machine or Seale Maker, Wharfinger, Whip Maker, Whitesmith, Wire Maker, Wood Dealer.

Classification medium, includes the occupations, professions, and employments named under classifications preferred and ordinary, and also the following named: Baggage Master, at station, Bar Keeper, Blacksmith, working, Blast furnace, workman in, Block, Oar, and Mast Maker, Bolt Maker, Brass Founder, working, Bricklayer, Broker in Cattle and Horses, Boiler Maker, Butcher, Button Maker, Captain of River Steamer, Car Driver, Car Builder, Cleaner, or Repairer, Carpenter and Joiner, Caulker, ship, Coachman, Coal Heaver, Conductor on Passenger Train, Cooper, Cork Cutter, Drayman, Driver of Express Wagon, cities, Drover, cattle dealer, Engineer on River Steamer, low pressure, Farm Laborer, Farmer, working, Fireman, engine, hose, hook and ladder, Foundry, employé in, Freight Agent, at station, Glass Blower, Horse Dealer, Hod Carrier, Hostler, Jailer, Laborer, wharf, warehouse, grain elevator, Lead Pipe and Tube Maker, Lighthouse or Lightship Keeper, Lightning Rods, one who puts up, Livery Stable Keeper, Lumberman, manufacturer, Mail Agent, travelling, Mason, bricklayer, stone setter, Mate of River Steamer, Metal Turner, Moulder, Naval Officer, in service, Oil Dealer, petroleum, Painter, house or ornamental, Policeman, Prison Keeper, Puddler, Quarryman, Railroad Contractor, Roadmaster, Rolling Mill, workman in, Scythe and Sickle Maker, Signalman, Ship Carpenter, Shipsmith, Signalman, railroad, Showman, Slate Quarrier, Soda Water Manufacturer, Stationman, Stable Keeper, Stage Driver, Sugar Refinery, workman in, Telegraph Builder or Repairer, Thresher, Track Laborer, Track Superintendent or Inspector, Truckman, Turpentine, Tar, and Rosin Manufacturer, Varnish Maker, Watchman, Wheelwright, Wood Chopper.

Classification hazardous, includes the occupations, professions, and employments named under classifications preferred, ordinary, and medium, and also the following named: Base Ball Player, Boatman, Canal Boatman, Captain of Lake or Sea Vessel, Captain of Lake or Sea Steamer, Chemist, manufacturing, Dock Laborer, Engineer of River Steamer, high pressure, Engineer, mining, Employé on Construction Train, Farrier, Fisherman, Fireman, river or sound steamer, Grinder of Edged Tools, Horse Shoer, Hunter, Ivory Cutter and Worker, Lighterman, bargeman, Limestone Quarrier, or Burner, Lumberman, logger, chopper, Master or Mate of Sailing Vessel or Steamer, on lake or sea, Match Maker, Nightman, Operative in Saw or Planing Mill, not buzz sawyer, Pilot, Roofer, slate or tin, Sash and Blind Maker, Scavenger, Ship Rigger, Seaman on Lake or Sea Steamer, Shooting Gallery Keeper, Slater, Soap Boiler, Steel Polisher, Stevedore, Steward on Vessel or Steamer, Switchman, railroad, Timber Hewer, Trapper, Turner, wood or ivory, Veterinary Surgeon, Vitriol Manufacturer.

Classification extra hazardous, includes all the occupations, professions, and employments named under classifications preferred, ordinary, medium,

and hazardous, and also the following: Brakeman on Passenger Trains, Buzz Sawyer, Circular Sawyer, Cartridge Maker, Conductor on Freight Trains, Common Sailor, Fireworks, maker of, Horse Breaker, Locomotive Engineer or Fireman, Percussion Cap Maker, Pyrotechnist, Raftsman, Yardmaster, Dispatcher or Coupler, railroad.

Persons engaged in occupations other than those named in the above classifications may be insured by special contract, the rates for which may be learned from the company or its agents.

NOTICE RESPECTING ASSIGNMENTS.

[See Condition No. 7.]

The principal sum insured herein can be assigned only by the person or persons to whom it is, by the terms of the policy, made payable; and such principal sum is always subject to diminution to the extent of the weekly indemnity paid to the insured during the policy year.

The weekly indemnity herein insured can be assigned only by the person whose life is insured.

A copy of every assignment must be given to the company within thirty days after its execution.

Traveller's General Accident Ticket.

RAILWAY PASSENGERS ASSURANCE COMPANY,

OF HARTFORD, CONN.

\$3,000.

STATION No.

		This policy will be good for ONE DAY, commencing with the hour of date, and is subject to pro- visions of contract on the back hereof.	
		<i>Secretary.</i>	
Form		Not Transferable.	
1		TWENTY CENTS.	

Provisions on the back referred to.

THE RAILWAY PASSENGERS ASSURANCE COMPANY, of Hartford, Conn., will indemnify the insured under this contract in the sum of fifteen dollars

per week against loss of time, not exceeding twenty-six consecutive weeks from the date of the accident under which claim is made, while totally disabled and prevented from the transaction of all kinds of business, solely by reason of bodily injuries, effected through outward and accidental violence; or in the event of death within ninety days from the happening of such accident, when caused proximately and solely by bodily injuries as aforesaid, will pay to the legal representatives of the insured the sum of three thousand dollars.

Provided always, that this insurance shall only extend to bodily injuries, fatal or non-fatal, as aforesaid, when accidentally received by the insured while actually riding in a public conveyance, provided by common carriers, for the transportation of passengers in the United States or Dominion of Canada, and in compliance with all rules and regulations of such carriers, and not neglecting to use due diligence for self-protection; and *provided*, that in the event of bodily injury or death insured against, by reason of which a claim for loss may be made under this contract, *immediate notice* shall be given to the company, at Hartford, Conn. Insurance on any one person is limited to \$6,000 in case of death, and no one holding more than one policy issued by this company will be entitled to receive in excess of that sum, or \$30 weekly indemnity for total disability as aforesaid. Women will be insured under this contract against death only, and this insurance shall not extend to children under sixteen years of age, nor to persons bereft of reason, sight, or hearing, nor to employes on public conveyances while on duty, nor to any voyage or exposure upon the high seas, nor to disabilities or death by reason of bodily infirmities or disease of any kind, nor to mysterious disappearances, or any case of death or disability the cause or manner of which is unknown or incapable of positive proof.

No suit shall be brought for loss under this contract unless within one year from the time the right of action accrues.

This policy is not transferable, and the name and residence of the insured is required to be written below.

President.

Name,
Residence,

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